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In the Supreme Court of the United States

October Term, 1973

No. 73-1125

ADMIRAL-MERCHANTS MOTOR FREIGHT, INC., et al.,

Petitioners,

v.

CONTAINER CORPORATION OF AMERICA and MONTGOMERY WARD & CO., INCORPORATED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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January, 1974

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CONTAINER CORPORATION OF AMERICA and MONTGOMERY WARD & CO., INCORPORATED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners, Admiral-Merchants Motor Freight, Inc., et al.. are motor common carriers of property in interstate commerce and were Appellees in the Court below. Said Petitioners respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on December 11, 1973.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. The opinion of the trial court which was reversed is unreported. Both decisions are set forth in their entirety in Appx. D, attached.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on December 11, 1973. This Petition for Certiorari has been filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Whether the provisions of 49 U.S.C. §16(3)(f) of the Interstate Commerce Act extinguished the shippers' right to sue on an order of the Interstate Commerce Commission entered June 5, 1969, where the shippers failed to sue within one year of the entry of the Commission order for the payment of money.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 49:

§16(2) If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated, and

except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

§ 16(3)(f) A complaint for the enforcement of an order of the Commission for the payment of money shall be filed in the district court or the State court within one year from the date of the order, and not after.

STATEMENT OF THE CASE

This proceeding is one of a series (see Appx. A) at various stages of litigation involving an Interstate Commerce Commission order purporting to require the payment of refunds entered against motor carriers during the course of an I.C.C. general revenue investigation proceeding. Related Petitions for Certiorari presenting different issues have previously been submitted to this Honorable Court in connection with the underlying issue of whether the reparations' enforcement provisions of Part I of the Act create a cause of action for enforcement of a refund order against motor carriers (normally subject to Part II of the Act). *Admiral-Merchants Motor Freight, Inc. v. Aluminum Company of America,* No. 73-669 (certiorari denied, December 17, 1973); *A & B Transfer, Inc. v. S. S. Kresge Co.*, No. 73-1056 (Petition for Certiorari filed January 7, 1974) (on appeal from the Sixth Circuit's split decision). The underlying facts and circumstances antecedent to the present proceeding in the trial court and the Court below are substantially the same as those which preceded the Court actions in the above-referenced two cases.

During the course of a general revenue investigation proceeding, upon request of certain protestants (which had been acquiesced in by the motor carrier respondents), the I.C.C. granted a necessary continuance. The procedural order contained a refund mandate in the language of a condition. The carrier respondents to that proceeding filed a petition for reconsideration which was later withdrawn leaving the order

stand as issued. Following hearing, the I.C.C. entered its report and order finding the increased rates (which had become effective without suspension) "have not been shown to be just and reasonable" and ordered their cancellation. The Commission –

> . . . further ordered, That in accordance with the order entered herein on April 25, 1968, the respondents be, and they are hereby, required to refund to shippers the charges on shipments moving after May 20, 1968, to the extent that such charges included the increases herein found not shown to be just and reasonable. Appx. B (4).

The motor carriers sought further hearing directed at the refund language based upon tendered evidence concerning the actual experience of the carriers under the unsuspended rates. On August 29, 1969, the I.C.C., based upon the same evidence, permitted even higher rates to take effect on and after the date of cancellation of the investigated increases, but denied reconsideration or further hearing on the refund language. It further ordered:

> . . . that the respondents will hereinafter, in accordance with the said decision of June 5, 1969, make refund to shippers presenting their claims to the carriers supported by paid freight bills or other appropriate evidence. Appx. B (5).

Upon further petitions by the carriers and by certain shipper protestants, the Commission denied the relevancy of reparations decisions to the order which it entered in the rate-making proceeding. Appx. B (6). Simultaneously, the protestants' prayer for (1) an accounting, or (2) a self-executing pay-back order was denied,

> . . . because the order of August 29, 1969, did not change the liability for making refunds, previously determined, but appropriately placed the burden for supporting claims for refunds upon the shippers who paid the charges. Appx. B (6).

Later the Commission:

> Voted to authorize the General Counsel to state to the district court in a motion to dismiss the action (Civil Action No. C-2030) or other appropriate pleading, that the true basis of the shippers' right to a refund is their common law remedy for restitution . . .. Appx. B (7).

Certain of the motor carriers, including a few of the present Petitioners, applied for injunctive relief to a three-judge court, continuing to maintain that the Commission was without authority to award refunds under Part II of the Interstate Commerce Act. Holding that the I.C.C. had no common law or statutory power to enter a refund order and that as a procedural device it could not commend the Commission action, the three-judge court nevertheless refused to annul the refund order, because of the motor carriers' initial withdrawal of objection to the inchoate refund language contained in the I.C.C. order which had granted the continuance. *Admiral-Merchants Motor Freight, Inc. v. United States*, 321 F. Supp. 353 (D. Colo., 1971). This Court affirmed the three-judge dismissal of the Urgent Deficiencies Act suit and denied the motor carriers' petition for rehearing. 404 U.S. 802; 404 U.S. 987.

On April 27, 1971, the shippers, Container Corporation and Montgomery Ward, commenced the instant action against the motor carrier Petitioners. The complaint alleged that the shippers were seeking to enforce the Commission order of June 5, 1969 which was attached as Exhibit 2 of the complaint. The shippers invoked the trial court's jurisdiction under § 1336 of Title 28 and certain other provisions. On the date set for trial in the matter, the Court, Honorable Richard B. Austin, United States District Judge, presiding, granted the defendant carriers' motion to dismiss the complaint. The trial court ruled:

> The motion of defendants to dismiss the complaint is granted. A cause does not lie under 49 U.S.C. § 16(2) because the suit was not brought

> within one year of the date of the I.C.C. order as required by 49 U.S.C. §16(3)(f). An action for restitution does not lie because there are no allegations of diversity or jurisdictional amount. While plaintiffs brought the suit within two years of the I.C.C. order and therefore a reparation action under 49 U.S.C. §304(a) [sic — 304a(2), (5)] might have been proper, the complaint does not plead a reparations action.
> Appx. D(1). (Bracketed material added)

Upon appeal, the Seventh Circuit reversed, holding

> ... that §16(3)(f) did not begin to run until the judicial review sought by the carriers was concluded and the stay which had been entered by the district court in Colorado was lifted.
> Appx. D (2).

The "stay" order referenced was actually several orders. First there was a temporary restraining order entered during the course of a direct review action instituted on January 26, 1970. The temporary restraint entered by the three-judge tribunal on June 19, 1970 became a preliminary injunction on November 6, 1970 until further order of that Court. Further order occurred in January of 1971 when the Court refused to annul the Commission's action. Later, in March of 1971 the three-judge tribunal entered another stay pending appeal to this Honorable Court and a precautionary appeal to the Tenth Circuit. Ultimately, upon affirmance by this Honorable Court the motor carrier plaintiffs in the three-judge review case sought and obtained dismissal of the precautionary appeal from the Tenth Circuit on December 27, 1971.

In short, the Seventh Circuit has held that one year from the date of the order would not commence until following judicial review, if sought, and in this instance that an order entered June 5, 1969, need not be sued upon until December 27, 1972.

REASONS FOR GRANTING THE WRIT

The unique Seventh Circuit interpretation of the involved substantive limitation on shippers' right to sue to enforce Interstate Commerce Commission orders for payment of money presents direct and substantial conflicts with prior rulings of this Court. The interpretation not only deviates substantially from interpretations by other lower courts, but adversely affects the right to judicial review of the agency's orders. The decision below not only affects numerous cases presently pending, but, in addition, will have a direct impact on rail and motor carrier cases in the future. Resolution of the proper application of the limitations provisions of the statute is essential for its uniform application and is well within this Court's supervisory powers and functions.

The Commission's order of June 5, 1969 underlying this action was unique in the history of the Motor Carrier Act. It was the first time that motor carriers had ever been ordered to refund portions of effective tariff charges without findings that the charges were affirmatively unjust and unreasonable when charged. Upon review, the unprecedented action of the Commission was found to be beyond its statutory powers and, because the proceeding before it was legislative in character, beyond any assumed common law powers. While not commending the procedure as one which "could be or should be" utilized, the three-judge review tribunal refused to annul the Commission's action because the carriers were found to have tacitly accepted the inchoate refund requirement attached to an earlier continuance order by withdrawal of a petition for reconsideration directed at that Commission action. The unprecedented decision of the three-judge court was affirmed on direct appeal. Subsequently, the instant suit and numerous other cases predicated upon the Commission's order (see Appx. A) were commenced throughout the country. In yet another unprecedented decision, the Seventh Circuit ruled that shippers had a cause of action for enforcement of the Commission order against motor carriers and that although the Commission had not attempted to exercise a statutory power, the reparations' enforcement provisions for enforcement of Commission orders entered under its statutory power

contained in Part I of the Act, could be utilized to enforce non-reparation Commission orders for the payment of money entered under Part II of the Act against motor carriers. *Aluminum Company of America v. Admiral-Merchants Motor Freight, Inc.*, ____ F.2d ____, 42 U.S.L.W. 2072, 1973 F. Carr. Cas. para. 82,420 (7th Cir., 1973) (Petition for Certiorari denied, December 17, 1973). Shortly thereafter, the Sixth Circuit ratified the newly-created right and adopted the Seventh Circuit's rationale in a two to one decision of that Court. *S. S. Kresge Co. v. A & B Transfer, Inc.*, ____ F.2d ____, (6th Cir., 1973) (Petition for Certiorari pending).

The instant decision proceeds from the hypothesis that the non-statutory order of the Commission is enforceable under §16(2) of the Interstate Commerce Act, Part I, as if it were a Part I statutory order.

The emergence of this new right of action has resulted in a plethora of issues of first impression concerning the application of this railroad provision to the unique motor carrier order entered. Among, and perhaps paramount among, the subsidiary issues generated in this connection was the application of the substantive limitation upon the right to sue contained in §16(3)(f) of the Part I of the Interstate Commerce Act, an ingredient of the cause of action contained in §16(2) of that Act. While rail cases concerning the provision were abundant, antecedent to the present litigation, there had been no application of the section in connection with refund orders, non-statutory orders, or orders against motor carriers. When presented with the issue, the lower courts have, in the present series of cases deriving from the instant Commission order, resolved the matter in an assortment of different ways. In the instant case, Judge Austin found that the complaint filed more than one year from the pleaded June 5, 1969 order came too late. In the same district, an interlocutory decision in a related proceeding, *Bela Seating Co. v. Advance Transportation Co.*, 344 F. Supp. 854 (N.D. Ill., 1972), the Court held that the time for filing suit did not run until the expiration of one year after the final Commission order of October 27, 1969, as interrupted by the three-judge court's restraint on the effectiveness of that order – culminating

in a termination date of March, 1972. Several other courts have followed that determination in published decisions presently pending on appeal – *Land O'Lakes, Inc. v. United-Buckingham Freight Lines, Inc.*, 351 F. Supp. 102 (D. Minn., 1972); *Proctor & Gamble Distributing Co. v. Byers Transportation Co., Inc.*, 355 F. Supp. 547 (W. D. Mo., 1973). The latter decisions, however, and other arguments based upon the filing of a class action and attempting to tie the limitations period to the filing of claims by shippers, have been rejected by the Seventh Circuit as unreasonable interpretations of the substantive limitation involved. Appx. D(2), at D-6.

Section 16(3)(f) has received a substantial amount of judicial attention previously by this Honorable Court and other courts throughout the nation. The interpretation now attributed to the statute constitutes a substantial deviation from any prior precedent and is a direct incursion upon the prior consistent holdings of this Honorable Court.

The statutory limitation provided in § 16(3)(f) is substantive in nature and not a procedural statute of limitations, containing, as it does, the words "and not after". *A. J. Phillips Co. v. Grand Trunk W. Ry.*, 236 U.S. 662, 667 (1915); *Kansas City So'n Ry v. Wolf*, 261 U.S. 133 (1922); *cf., Louisville Cement Co. v. I.C.C.*, 246 U.S. 638, 642 (1918); *William Danzer & Co. v. Gulf & Ship Island R.R.*, 268 U.S. 633 (1925).[1]

In *Mid-State Horticultural Co., Inc. v. Pennsylvania R.R.*, 320 U.S. 356 (1943), at the instance of the affected shipper, a rail carrier agreed not to sue for freight charges within the three-year period provided by statute. In consideration of the

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[1]Lower court decisions interpreting the language involved are numerous. *E.g., Louisville & Nashville R.R. v. Cory*, 54 F.2d 8, 10, 11 (6th Cir., 1931); *Arkansas Fertilizer Co. v. United States*, 193 Fed. 667 Comm. Ct., 1911); *New York, N.H. & H. R.R. v. New England Fwdg Co.*, 119 F. Supp. 380 (D. R.I., 1953); *Acheson Graphite Co. v. Mellon*, 21 F.2d 562 (W.D. N.Y., 1927); *Wisconsin Bridge & Iron Co. v. Illinois Term. Co.*, 88 F.2d 459, 462 (7th Cir., 1937); *Missouri Pac. R.R. v. Austin*, 292 F.2d 415, 417, 418 (5th Cir., 1961); *Stott Briquette Co. v. New York Cent. R.R.*, 92 F. Supp. 115, 116 (N.D. Ohio, 1950).

carrier's forbearance, the shipper undertook not to plead the defense of limitations in any later suit. Suit was begun within the extended period agreed upon, and the shipper, notwithstanding its agreement, pleaded the statute. Despite the agreement this Court held that the expiration of the statutory period destroyed the right. After extensive discussion of the explicit provisions of the Act, the Court said:

> We are not unmindful of the hardship to respondent in these special circumstances, although petitioner asserts it would suffer equal hardship if the decision were the other way. Nor do we ignore the strong equitable considerations which, in relation to other types of litigation not so permeated with provisions and policies for protecting the general public interests, might move against denying effect to such an agreement. But this case boils down to an old adage about sauce and geese, which need not be given citation.
> 320 U.S. at 367.

The Seventh Circuit cites the *Mid-State Horticultural* decision in support of its proposition that protective suits are not required. The holding of this Court in that case, however, is diametrically to the contrary. In point of fact, the Court held that waiver of the statute of limitations provisions was not possible and that suit must be filed within the express terms of the limitation on the right to sue.

> The paramount policy of §16 is to secure promptness in collection. That policy would not be promoted by construing the period as variable . . .." 320 U.S. at 367.

See 320 U.S. at 362, n. 14, for history of the limitations provisions.

Unquestionably, the leading decision on §16(3)(f) language is the *Phillips* decision. The proper course of action for shippers seeking enforcement of Commission orders for the payment of

money was explained in that case, which was brought under the *intended* coverage of § 16(2) – a reparations case against railroads:

> But while every person who had paid the rate could take advantage of the finding that the advance was unreasonable [for the past] he was obliged to assert his claim within the time fixed by law. When the overcharge was collected a cause of action at once arose and the shipper at once had the right to file a complaint, or to intervene in the proceedings instituted by others. If he failed to take either of those steps and there was a finding of unreasonableness in the proceedings begun by others, he could, if in time, present his claim, and await the result of the litigation over the validity of any order made at the instance of those parties. If it was ultimately sustained by the court as valid he would then be in a position to obtain reparation from the Commission – or a judgment from a court of competent jurisdiction, on a claim that had been seasonally presented. But neither proceedings begun by other shippers, nor findings of unreasonableness and orders issued thereon by the Commission, would save the rights of those who disregarded the requirements of the Hepburn Amendment, that
>
> > "all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court within one year from the date of the order, and not after, provided that claims accrued prior to the passage of this act may be presented within one year . . ."

In the present case the overcharges were made and paid prior to August, 1904. The present suit was brought May 9, 1909, less than two years after

> the validity of the Commission's order was sustained by the Supreme Court, but more than one year after the passage of the Hepburn Amendment, and more than four years after the plaintiff's cause of action arose. *A. J. Phillips Co. v. Grand Trunk W. Ry.*, 236 U.S. at 665-67 (Bracketed material added).

Thus, the Seventh Circuit's determination that the pendency of review proceedings affected the enforceability of the order stands as a direct repudiation of the clear determinations made by this Court in *Phillips*. The explicit ruling in *Phillips* was that it was incumbent upon shippers to take action for enforcement within the statutorily specified date upon which the cause of action accrued – namely, here, within one year from the date of the entry of the order of the Commission. This was not done. In *Phillips*, where a two year statute of limitations applied to the shippers' action, the suit had been brought within two years of the final Supreme Court affirmance of the Commission's reparations findings, but the limitations provisions were *held* to have precluded the shippers' suit nonetheless.

The ruling of the Seventh Circuit (in addition to disregarding the prior precedents of that Court[2] and of the *Phillips* line of cases in this Court) results in an elastic limitations provision. Congress provided a *substantive* one-year limitation of "one year from the date *of* the order" – meaning, of course, the Commission's order, not some later court determination. *Because there is, at present no time during which the direct review of a Commission order entered under Part II of the Act must be brought, the Seventh Circuit ruling that the statute had not expired until direct review was completed results in a different application in every instance*

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[2] In *Wisconsin Bridge & Iron Co. v. Illinois Term. Co.*, 88 F.2d 459 (7th Cir., 1937), that Court ruled, previously that –

> Appellee also relies upon sub-section (3)(f) of section 16 (49 U.S.C.A., § 16(3)(f)), which provides that an action shall be brought within one year of the *entry* of an order of the Commission for the payment of money.

Id., at 461, 462 (Emphasis added).

and totally frustrates the clear intent of Congress to dispose of such claims by requiring immediate action by shippers.

Three-judge review is obtained, normally, under the provisions of 49 U.S.C. §305(g), 49 U.S.C. §17(9), 28 U.S.C. §1336(a), 28 U.S.C. §2284, and 28 U.S.C. §§2321 through 2325. None of those provisions place a limitation upon time within which a wronged party may bring the review action.[3]

The unfairness of the Seventh Circuit's interpretation of the statute is easily described by the following circumstances. Under Part II of the Act, refusal to comply with a Commission order may result in the imposition of criminal penalties. 49 U.S.C. §322(a). The only way to test and avoid the agency's order would be to bring a direct review action, obtaining injunctive relief *pendente lite* pursuant to the direct review provisions referenced above. However, under the present court interpretation of §16(3)(f), this action would be taken only at the risk of extending a substantive limitation for several years during the pendency of that direct review litigation. Thus, a substantial "price" must be paid for the right to review.

In the present instance, review was not sought until January, 1970, although a full Commission decision entered on June 5, 1969. Dozens of pending cases depend upon the proper interpretation of §16(3)(f). See Appx. A. The decision of the Seventh Circuit will, from henceforth, affect virtually all future determinations regarding whether to exercise the right to appeal from Commission orders for the payment of money, whether entered against railroads or motor carriers.

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[3]Section 1336(b) and (c) contain an exception to the general rule. When a district court or the court of claims refers a question to the Commission for determination, the review action must be brought within 90 days. The exception has no applicability here.

WHEREFORE, premises considered, a Writ of Certiorari should issue to review the Judgment Opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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January, 1974

APPENDICES

SYNOPSIS OF CASES ARISING OUT OF I.C.C. DOCKET 34971 ORDER

Case Series (Name) (a)	Lower Court & Docket #s (b)	# of Complaints involved (c)	# of Plaintiffs still in (d)	# of Defendants still in (e)	Disposition by Trial Court & Cite (f)	Court of Appeals & Docket #s (g)	12/12/73 Status (h)
Mueller Co. v. United Buckingham Freight Lines	Cir. Ct., 6th Jud. Distr. Macon County Ill. 70-LM-264	1	1	8	–	–	Process Not Yet Served
Amana Refrigeration, Inc. v. Bruce Transfer (Consol.)	U.S.D.C. No.D. Iowa, Cedar Rapids Div. 70-C-13-CR 70-C-14-CR 71-C-19-CR 71-C-21-CR	4	3	23	Summary Judgment for PS. Costs, Fees (100% of award) 4% Interest from 10/12/71. [unreported]	8th Cir. 73-1507 73-1508 73-1509 73-1510 (Consol.)	Briefed in Circuit.
Liberty Glass Co. v. Arkansas Best Freight Systems, Inc.	U.S.D.C. No.D. Okla. 70-C-187 thru 191	5	1	5	Action To Be Dismissed with Prejudice.	–	Settled.

SYNOPSIS OF CASES ARISING OUT OF I.C.C. DOCKET 34971 ORDER

Case Series (Name) (a)	Lower Court & Docket #s (b)	# of Complaints involved (c)	# of Plaintiffs still in (d)	# of Defendants still in (e)	Disposition by Trial Court & Cite (f)	Court of Appeals & Docket #s (g)	12/12/73 Status (h)
Liberty Glass Co. v. Western Gillette Inc.	Dist. Ct. for Creek County, Okla. C-70-140 (Consol.)	14	1	14	Action To Be Dismissed with Prejudice.	—	Settled.
American Crystal Sugar Co. v. Indianhead Truck Lines	U.S.D.C. D. Minn., 4th Div. 4-70 Civil 226	1	1	10	Summary Judgment for P., Costs, Fees, 6% interest from 6/5/69. 351 F.Supp.102 359 F.Supp.741	8th Cir. 73-1580	• Motion to consol. granted. • Partially Briefed in Circuit.
Land O'Lakes v. United Buckingham Freight Lines, Inc.	U.S.D.C. D. Minn., 4th Div. 4-71 Civil 221 thru 238 & 240	19	1	19	Same	8th Cir. 73-1581	

Container Corp. v. Hart Motor Express, Inc.	U.S.D.C. D. Minn., 4th Div., 4-71 Civil 264	1	2	6	Same	8th Cir. 73-1682	• Consolidation of these cases with all other related 8th Cir. cases for argument has been granted
United States v. Admiral-Merchants Motor Freight, Inc.	U.S.D.C. D. Minn., 4th Div. 4-71 Civil 189	1	1	27 (See note 1)	Summary Judgment for P., Costs and interest at 4% from 6/5/69. [unreported]	8th Cir. 73-1670	
United States v. Arkansas Best Freight System, Inc.	U.S.D.C. No.Dist. Tex. Ft.Worth Div. 4-1739	1	1	21	Summary Judgment on liability for P. [unreported] [no opinion]	–	To be tried on issue of damages. (Not yet set).

SYNOPSIS OF CASES ARISING OUT OF I.C.C. DOCKET 34971 ORDER

Case Series (Name) (a)	Lower Court & Docket #s (b)	# of Complaints involved (c)	# of Plaintiffs still in (d)	# of Defendants still in (e)	Disposition by Trial Court & Cite (f)	Court of Appeals & Docket #s (g)	12/12/73 Status (h)
United States v. Burlington Truck Lines, Inc.	U.S.D.C. W.Dist. Mo. W. Div. 19339-4	1	1	12	Judgment for P. Costs & 4% interest from 5/4/71. 356 F.Supp.582	8th Cir. 73-1202	• Consolidated in 8th Cir.
Western Electric Co. v. Burlington Truck Lines, Inc.	U.S.D.C. W.Dist. Mo. W. Div. 18471-4	1	1	10	Judgment for PS. Costs, Fees, 6% interest from 6/25/70. [unreported]	8th Cir. 73-1200	• Partially Briefed
Proctor & Gamble Co. v. Ideal Truck Lines	U.S.D.C. W.Dist. Mo. W. Div. 18829-4	1	2	3	Judgment for PS. Costs, Fees, 6% interest from 8/12/70 355 F.Supp.547	8th Cir. 73-1201	

Proctor & Gamble Co. v. Admiral Merchants Motor Freight, Inc.	U.S.D.C. No.Dist. Ill., No. Div. 71-C-258	1	3	32	–	–	Stayed. Stipulated on outcome of P.G.C. appeal (Now in 8th Cir.) At issue.
Proctor & Gamble Co. v. Burlington Truck Lines, Inc.	U.S.D.C. No.Dist. Ill., No. Div. 71-C-1012	1	3	2	–	–	Same.
Sweetheart Cup Corp. v. Advance United Expressways, Inc.	U.S.D.C. No.Dist. Ill., No. Div. 71-C-1020 71-C-1021	2	2	48	–	–	Same.
Proctor & Gamble Co. v. Western Trucking Co.	U.S.D.C. E. Dist. Mo. E. Div. 70-C-578(1)	3	1	1	–	–	Same.
Western Electric Co. v. Admiral Merchants Motor Freight, Inc.	U.S.D.C. No. Dist. Ill. E. Div. 70-C-1531	1	1	66	–	–	Inactive. Will probably follow outcome Kansas City Western Electric case. (Now in 8th Cir.) At issue.

SYNOPSIS OF CASES ARISING OUT OF I.C.C. DOCKET 34971 ORDER

Case Series (Name) (a)	Lower Court & Docket #s (b)	# of Complaints involved (c)	# of Plaintiffs still in (d)	# of Defendants still in (e)	Disposition by Trial Court & Cite (f)	Court of Appeals & Docket #s (g)	12/12/73 Status (h)
Container Corp. v. Admiral Merchants Motor Freight, Inc.	U.S.D.C. No.D. Ill. E. Div. 71-C-996	1	2	84	Judgment for Ds. [unreported]	7th Cir. 72-1646	Reversed. Petition for Certiorari in January, 1974.
Montgomery Ward & Co., Inc. v. Anderson Motor Services, Inc.	U.S.D.C. No. Dist. Ill. E. Div. 71-C-2019	1	1	33	Transfer of venue from W.D. Mo. 339 F.Supp.713	—	Inactive pending resolution of Container Corp. case immediately above. At issue.
Bemis Co., Inc. v. Burlington Truck Lines, Inc.	U.S.D.C. No.Dist. Ill. E. Div. 70-C-1580	1	5	17	Summary Judgment for Ps. [unreported] fees, but no costs or interest.	7th Cir. 73-1695	Appeal dismissed. Settled.

Bemis Co., Inc. v. Admiral Merchants Motor Freight, Inc.	U.S.D.C. D.Minn, 4th Div. 4-70- Civil 237	1	5	32	–	–	Settled.
Federal Cartridge Corp. v. Ward Transfer, Inc.	U.S.D.C. D. Minn, 4th Div. 4-71 Civil 247	1	1	1	–	–	Settled.
S. S. Kresge Co. v. A & B Transfer, Inc.	U.S.D.C. E. Dist. Mich. So. Div. 34887	1	1	Approx. 200 - (approx. 200 dismissed with prejudice)	Summary Judgment for P. No interest or fees.	6th Cir. 72-1967	Affirmed. Petition for Certiorari pending.
Addison Products Corp. v. C. H. Rumpf & Sons	2d Dist. Ct. Michigan 4058-RK 4059-R	2	1	2	–	–	Set for trial 2/25/74.

SYNOPSIS OF CASES ARISING OUT OF I.C.C. DOCKET 34971 ORDER

Case Series (Name) (a)	Lower Court & Docket #s (b)	# of Complaints involved (c)	# of Plaintiffs still in (d)	# of Defendants still in (e)	Disposition by Trial Court & Cite (f)	Court of Appeals & Docket #s (g)	12/12/73 Status (h)
American Seating Co. v. Roche Transfer Line	61st Jud. Dist. Ct., Michigan. 51684	1	1	5	–	–	Stipulated on outcome of Kresge appeal.
L. E. Trotter & Assoc. v. Associated Truck Lines, Inc.	U.S.D.C. W. Dist. Mich. So. Div. G 254-71-CA (Consol)	19	1	19	–	–	Inactive. At issue.
Steel Case, Inc. v. Interstate Motor Freight System	61st Jud. Dist., Michigan 50609	1	1	6	–	–	Inactive. At issue.
Bergstrom Paper Co. v. C. W. Transport, Inc.	Dane County Cir. Court, Branch III, II Michigan 131-053 131-054	2	1	3	–	–	Stayed pending resolution of Kresge appeal.

American Can Co. v. C. W. Transport Inc.	U.S.D.C. W. Dist. Wisc. (Consol.) 70-C-166 thru 174	9	1	9	–	–	Stayed pending resolution of Kresge appeal.
Brockway Glass Co. v. Jones Truck Lines, Inc.	Muskogee County Dist. Ct., Okla. (Consol.) C-71-267 thru 271	5	1	5	–	–	Trial cont'd indefinitely.
Aluminum Co. of America v. Admiral Merchants Motor Freight, Inc.	U.S.D.C. No. D. Ill., E. Div. (Consol.) 70-C-1189 thru 1200.	11	1	11	Summary Judgments for P. Costs, attorney fees, 6% interest from 6/5/69. 337 F. Supp. 674 337 F. Supp. 683 342 F. Supp. 166	7th Cir. 72-1264 thru 1268 72-1505 thru 1512 (Consol.) (affirming trial court) __F.2d__ 1973 Fed. Carr.Cases ¶84,420 petition for reh. denied (unreported) Attorney fees allowed (unreported)	Petition for certiorari pending.

SYNOPSIS OF CASES ARISING OUT OF I.C.C. DOCKET 34971 ORDER

Case Series (Name) (a)	Lower Court & Docket #s (b)	# of Complaints involved (c)	# of Plaintiffs still in (d)	# of Defendants still in (e)	Disposition by Trial Court & Cite (f)	Court of Appeals & Docket #s (g)	12/12/73 Status (h)
Minnesota Mining & Mfg. Co. v. Admiral Merchants Motor Freight Inc.	U.S.D.C. Dist. Minn. 4th Div. 4-71 Civ 221	1	1	21	Summary Judgment on liability for P. 351 F.Supp. 102 359 F.Supp. 741	–	Trial on damages held 7/5/73. Pending resolution. Appeal virtually certain.
Bela Seating Co. v. Advance Transportation Co.	U.S.D.C. No. Dist. Ill. E. Div. 71-C-2455	1	10	20 (9 to be dismissed)	Prior motions denied. 344 F. Supp. 854	–	Pending on motion for Summary Judgment.
Time, Inc. v. C.W. Transport Inc.	U.S.D.C. No. Dist. Ill. E. Div. 70-C-1952	1	1	3	Summary Judgment for plaintiff [unreported]	Not yet assigned 7th Cir.	Notice of Appeal filed 12/6/73

Levey Div., Cities Service Co. v. Abel Freight Lines, Inc.	U.S.D.C. No. D. Ill., E. Div. 71-C-1247	1	1	6 (22 dismissed)	Dismissed.	–	Settled.
Ceco Corp. v. Admiral-Merchants Motor Freight, Inc.	U.S.D.C. No. D. Ill., E. Div. 71-C-1217	1	1	38	–	–	Active. At issue.
Ryerson & Son, Inc. v. Advance United Express-ways, Inc.	U.S.D.C. No. Dist. Ill. E. Div. 71-C-1213	1	1	28	–	–	• Consolidated. •Active. •At issue.
Ryerson & Son, Inc. v. Arkansas Best Freight System, Inc.	U.S.D.C. No.Dist. Ill. E. Div. 71-C-1334	1	1	7	–	–	

SYNOPSIS OF CASES ARISING OUT OF I.C.C. DOCKET 34971 ORDER

Case Series (Name) (a)	Lower Court & Docket #s (b)	# of Complaints involved (c)	# of Plaintiffs still in (d)	# of Defendants still in (e)	Disposition by Trial Court & Cite (f)	Court of Appeals & Docket #s (g)	12/12/73 Status (h)
Coca-Cola Co. v. Murphy Motor Freight Lines, Inc.	U.S.D.C. No. Dist. Georgia Atlanta Div. 15144	1	1	24	–	–	Stayed until Jan. 1974. At issue.
Ryerson & Son, Inc. v. Chief Freight Lines, Inc.	U.S.D.C. E. Dist. Mo. E. Div. 71-C-317(2)	1	4	22	Dismissed with prejudice.	–	Settled
United Laboratories, Inc. v. Elgin Storage & Transfer Co.	U.S.D.C. No. Dist. Ill. E. Div. 71-C-1476	1	1	4	Dismissed with prejudice.	–	Settled.
Zenith Radio Corp. v. Be-Mac Transport Co.	U.S.D.C. No. Dist. Ill. E. Div. 71-C-1282	1	1	3	Dismissed with prejudice.	–	Settled.

Jones & McKnight Steel, Inc. v. Chief Freight Lines, Inc.	U.S.D.C. No. Dist. Ill. E. Div. 71-C-1218	1	1	22	Dismissed with prejudice.	–	–
Jones & McKnight Steel, Inc. v. Chief Freight Lines Co.	U.S.D.C. Dist. Minn. 4th Div. 4-71- Civ. 249	1	3	22	Dismissed with prejudice.	–	–
F & B Mfg. Co. v. Be-Mac Transport Co., Inc.	U.S.D.C. No. Dist. Ill. E. Div. 71-C-1245	1	1	5	Dismissed with prejudice.	–	–
Kendall Co. v. All American Transport, Inc.	U.S.D.C. No. Dist. Ill. E. Div. 70-C-1202	1	1	6	–	–	Inactive. Probable settlement. At issue.
Meredith Corp. v. All American Transport, Inc.	U.S.D.C. No. Dist. Iowa Central Div. 11-362-C-2	1	1	14	–	–	Same.

SYNOPSIS OF CASES ARISING OUT OF I.C.C. DOCKET 34971 ORDER

Case Series (Name) (a)	Lower Court & Docket #s (b)	# of Complaints involved (c)	# of Plaintiffs still in (d)	# of Defendants still in (e)	Disposition by Trial Court & Cite (f)	Court of Appeals & Docket #s (g)	12/12/73 Status (h)
Lennox Industries, Inc. v. Western Transp. Co.	Dist. Ct. for Marshall Iowa 31446 thru 31451 & 31683	7	1	7	–	–	Inactive. At issue.
Lennox Industries, Inc. v. Bruce Motor Freight, Inc.	Dist. Ct. for Polk County, Iowa Law Nos. 1173 thru 1175	3	1	3	–	–	Inactive. At issue
American Home Products Corp. v. A&B Transfer Co., Inc.	U.S.D.C. No. Dist. Ill. E. Div. 70-C-1562	1	8	129	Motion for Summary Judgment denied. [unreported]	–	• Consolidated before same judge.

Abbott Laboratories v. Advance United Expressways, Inc.	U.S.D.C. No. Dist. Ill. E. Div. 71-C-1236	1	39	110	Same	–	• Motion to reconsider, etc. pending.
Appleton Electric Co. v. Advance-United Expressways, Inc.	U.S.D.C. No. D. Ill. E. Div. 70-C-1427	1	1 plus approx 200,000 class members	17 plus approx 1400 class members	Classes defined [unreported] Summary Judgment on liability for Ps [unreported] Order notices to Ds [unreported] Order Discovery of Ps names & addresses [unreported]	7th Cir. 73-1323 (Appeal dismissed without prejudice) [unreported] 72-1201 (petition for Prohibition denied) (unreported) 73-1665 (1292(b) appeal allowed)	• Active in Trial Court. • Motion to add numerous Ps & Ds undecided. • Motions pending. • Interlocutory Appeal • Briefed and argued in 7th Circuit.

NOTES TO SYNOPSIS

1. Barber Transportation, Inc., an included defendant, on its own behalf only, has filed a motion for rehearing in the District Court. The motion is submitted on affidavits and has been argued. Barber has not yet filed notice of appeal, therefore.

Appendix B (1)

INTERSTATE COMMERCE COMMISSION
Office of the Secretary
Washington, D.C. 20423

Susp. -47380
March 29, 1968

NOTICE:

Upon petitions for reconsideration of the action of the Board of Suspension in declining to suspend, the entire Commission accepted the case upon referral from Appellate Division 2 and voted today not to suspend but to investigate in Docket No. 34971, *Increased Rates and Charges, From, To and Between Middlewest Territory*, protested schedules naming increases in motor common carrier class and commodity rates, minimum charges per shipments, and other charges including accessorial charges, between points in Middlewest territory, and between points therein *and* points in Central states and southwest territories, published in Supplements 2 and 6 to MF-ICC 541, and in numerous other tariffs of Middlewest Motor Freight Bureau, Agent, Kansas City, Mo., to become effective April 1, 1968, and later; and by order, to set forth procedures as to the nature of the evidence to be required of all parties of interest.

H. NEIL GARSON,
Secretary

SERVICE DATE
APRIL 2, 1968

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 29th day of March, 1968.

NO. 34971

INCREASED RATES AND CHARGES, FROM, TO AND BETWEEN MIDDLEWEST TERRITORY

There being under consideration the matter of increased class and commodity rates and charges, and rules, regulations and practices affecting such rates and charges, applicable on interstate or foreign commerce of shipments within middlewest states, and, between middlewest *and* central and southwest states and Alaska and Canada, as set forth in the following:

MIDDLEWEST MOTOR FREIGHT BUREAU, AGENT
MF-ICC 509:
In SUPPLEMENT 71, ITEM GI-68 except insofar as it would apply in connection with Item 10380 series;

MF-ICC 512:
In SUPPLEMENT 49, ITEM GI-68 except insofar as it would apply in connection with Item 7700 series;

MF-ICC 541:
SUPPLEMENT 2;
SUPPLEMENT 6;

MF-ICC 55:
SUPPLEMENT 42;

or as the same may be amended or reissued;

And all other tariffs, supplements or schedules of the above named agent, not designated in this order, inso-

far as they contain the same provisions or provisions of the same or similar import, or rates and charges incorporating increases the same as, or similar to, those set forth in the aforementioned tariffs or under investigation by reason of this order;

It appearing, That upon consideration of the tariff schedules, and protests thereto, there is reason to institute an investigation to determine whether they result in rates and charges, rules or regulations and practices that are unjust and unreasonable, in violation of the Interstate Commerce Act; and good cause appearing therefor:

It is ordered, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates, charges, rules, regulations and practices contained in said schedules, with a view to making such findings and orders in the premises as the facts and circumstances shall warrant.

It is further ordered, That the investigation in this proceeding shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said rates, charges, rules, regulations and practices under the Interstate Commerce Act.

And it is further ordered, That the carriers parties to the said schedules, be, and they hereby, made respondents to this proceeding; that copies of this order be served upon the said respondents; and that notice of this proceeding be given the public by posting a copy of this order in the office of the Secretary of the Commission.

By the Commission.

H. NEIL GARSON,
Secretary

(SEAL)

Appendix B (2)

30459

INTERSTATE COMMERCE COMMISSION

No. 34971

INCREASED RATES AND CHARGES, FROM, TO AND BETWFEN MIDDLEWEST TERRITORY

Service Date

April 4, 1968

Increased Rates and Charges, From, To, and Between Middlewest Territory

Present: Laurence K. Walrath, Commissioner, to whom the matter which is the subject of this order has been referred for action thereon.

It appearing, That by order of the Commission dated March 29, 1968, in the above-entitled proceeding, an investigation was instituted into and concerning the lawfulness of the rates, charges, and regulations contained in the schedules described in said order,

And it further appearing, That in order that consideration be given to all factors which may bear upon a proper determination of the issues, including the question whether the resulting rates would be just and reasonable, it is deemed appropriate in the public interest that the information specified below be included in the record to be developed in this proceeding; and good cause appearing therefor:

It is ordered, That respondents be, and they are hereby, notified and required to submit information and supporting data which shall include, among other things, actual expense and revenue data (including anticipated expense and revenue data to show the effect of the proposed increase or decrease) and operating ratios specifically related to the

traffic and carriers involved, over-all operating ratios, detailed data to establish the representative nature of the carriers used, and in addition, all pertinent evidence and supporting data for the individual representative carriers as they relate to their over-all operations, and specifically to the traffic and territories involved.

It is further ordered, That the Commission will take official notice of all the respondent carriers' financial statements on file with the Commission.

It is further ordered, That the traffic studies to be submitted shall represent the most current period possible, and that they shall be based upon actual operations conducted during identical periods of time for each carrier; that the traffic studies shall be shown to be representative of the traffic covered by the rate proposal; and that the traffic study be costed out and operating ratios determined by the individual weight brackets included within the rate proposal. If the two carrier groups described below under the development of costs are used, the traffic study shall be similarly separated. The revenues and costs for both groups shall also be totaled and operating ratios developed.

It is further ordered, That respondents shall produce evidence showing the total revenue earned for the services performed under the bureau's tariffs here under investigation for the most recent annual reporting period.

It is further ordered, That the cost study shall be based upon the most current annual reporting period adjusted to date. The costs may be developed for those carriers subject to the requirements for allocation of expenses between line haul and pickup and delivery in 49 C. F. R. Part 182, Instructions 27 and 9002, whose total amount of revenue derived under the bureau's tariffs collectively is 75 percent or more of the total revenue derived by all carriers participating in those tariffs. If those instruction 27 car-

riers' revenue is less than 75 percent of the total, then all of the instruction 27 carriers should be used. These study carriers shall be selected from the participating carriers in descending order beginning with the carrier deriving the greatest dollar amount of revenue from those tariffs. Unit costs are to be developed separately for (1) those carriers who earn 50 percent or more of their revenues under the tariffs involved and (2) those carriers who earn less than 50 percent. If factors similar to those published in appendix A to Highway Form B for the above two groups of carriers are not available, the published factors for the applicable territory based on the latest study are acceptable in the development of the unit costs.

It is further ordered, That both the cost study and the traffic study be adequately supported by working papers to permit a complete check of the procedures followed and the results obtained.

It is further ordered, That respondents shall produce evidence of the sum of money, in addition to operating expenses, needed to attract debt and equity capital which they require to insure financial stability and the capacity to render service. This evidence should include, without limiting the evidence that may be presented, particularized reference to the respondents' reasonable interest, dividend, and surplus requirements; and experienced, projected, and needed rate of return on depreciated investment in transportation.

It is further ordered, That all Class I and II motor carrier respondents shall submit detailed data regarding carrier-affiliate financial and operating relationships and transactions including, with respect to any and all individuals, partnerships, and corporations affiliated with respondents, when such transactions individually or in the

aggregate amount to $2,500 or more during the year 1967, the following information:

1. Name of each affiliate from which respondent, during the year 1967, acquired, leased or purchased lands, buildings, equipment, materials, supplies, parts, tires, tubes, gasoline, oil, or other property or services used by respondent in its operations as a motor common carrier.

2. Kinds of property or service which each affiliate supplies to respondent.

3. Basis of charges for property or services supplied by affiliate to respondent including the base and rate for rental charges.

4. Total charges by each affiliate to respondent during the year 1967 for:

   a. Lease of vehicles.
   b. Lease of terminals.
   c. Lease of other property.
   d. Pickup and delivery of shipments.
   e. Repair and servicing of vehicles.
   f. Management, accounting, financial legal, purchasing, or traffic solicitation services.
   g. Property sold by affiliate to respondent.

5. If the affiliate derives revenue from the sale or lease of property or from services through transactions with persons other than respondent, indicate the percentage of the revenue of such business to the total revenue of the affiliate in the year 1967.

6. A copy of the income statement for each affiliate for the year 1967 and the latest period of 1968 for which an income statement is available.

7. A statement listing the amount of wages, salaries, bonuses, and other compensation paid by the affiliate in 1967 to any individual who is also a respondent or an officer, director or substantial stockholder of a respondent; or the wife or close relative of a respondent or officer, director or substantial stockholder of a respondent.

8. The term "affiliate" as used in this order means:
   a. Any individual who is also a respondent; an officer, director, or substantial stockholder of a respondent; or the wife or close relative either of a respondent, or of an officer, director, or substantial stockholder of a respondent.
   b. Any partnership in which one of the partners is a respondent; an officer, director, or substantial stockholder of a respondent; or the wife or close relative either of a respondent; or of an officer, director, or substantial stockholder of a respondent.
   c. Any corporation whose stock is wholly or partly owned by a respondent; by an officer, director, or substantial stockholder of a respondent; or by the wife or close relative either of a respondent or of an officer, director, or substantial stockholder of a respondent.
   d. Any corporation which exercises control over the operations or finances of respondent.

It is further ordered, That all of the required data specified in this order shall be based upon and reflect at least the 1967 annual reporting period.

It is further ordered, That the Department of Transportation and the General Services Administration be, and they are hereby, notified and requested to submit, as part of their presentation, evidence which will (1) adequately support the allegations contained in their protests before the Board of Suspension including data showing the productivity of respondents, any increase in such productivity for at least the calendar year 1967, and the labor costs per unit of productivity; (2) show what financial indicators should be considered by the Commission in making its decision in this proceeding; (3) show to what extent the Commission should consider operating ratios, return on invested capital, and rate of return on stockholders' equity,

in determining the revenue needs of respondents recognizing the differences which exist among the individual carriers both as to their financial conditions and their methods of operation; and, (4) should the Commission adopt any of these as criteria, show what percentage or percentages should the motor carrier industry be allowed in order to maintain a healthy financial condition.

It is further ordered, That the detailed information called for by this order shall be in writing and shall be verified by a person or persons having knowledge thereof; that such verified material shall be served on all parties of record on or before May 6, 1968, and at the same time, respondents shall file an executed original and 16 copies with this Commission, together with certificates of service in accordance with rule 1.22(a) of the General Rules of Practice. The information with respect to carrier affiliates may be served on the parties in summary form, if so desired.

It is further ordered, That all underlying data used in preparation of the material outlined above shall be made available in the office of the party serving such verified matter during usual office hours for inspection by any party of record desiring to do so; and that the underlying data shall be made available also at the hearing, but only if and to the extent specifically requested in writing and required by any party for the purpose of cross-examination.

It is further ordered, That anyone desiring to become a party of record to receive copies of the verified material of respondents to be filed in accordance with the procedure set forth above, must notify the Commission, in writing, on or before April 18, 1968. As soon as practicable after such date, a service list of all parties of record will be prepared and served by the Commission. Otherwise, any interested person desiring to participate in this proceeding may make his appearance at the hearing.

It is further ordered, That this proceeding be, and it is hereby, referred to Hearing Examiners Robert N. Burchmore and Richard McG. Wilkins for hearing commencing on May 20, 1968, at 9:30 o'clock a.m. District of Columbia Daylight Saving Time at the offices of the Interstate Commerce Commission, Washington, D. C.

It is further ordered, That this proceeding will not be the subject of an examiner's recommended report and order because due and timely execution of our functions requires an expedited decision and in addition, if the increases involved herein are not approved in their entirety, the shippers will be paying higher rates without any recourse to this Commission for relief.

It is further ordered, That a copy of this order be delivered to the Director, Division of Federal Register, for publication in the Federal Register as notice to all interested persons.

And it is further ordered, That, to avoid future unnecessary service upon those respondents, who, although participating carriers in the tariff schedules which are the subject of investigation herein, are not actively interested in the outcome of such investigation, subsequent service on respondents herein of notices and orders of the Commission will be limited to those respondents who:

(1) specifically make written request to the Secretary of the Commission to be included on the service list, or

(2) have appeared at a hearing.

Dated at Washington, D. C., this 3rd day of April, 1968.

By the Commission, Commissioner, Walrath.

H. Neil Garson

(Seal) *Secretary*

Appendix B (3)

30459

INTERSTATE COMMERCE COMMISSION

No. 34971

INCREASED RATES AND CHARGES, FROM, TO AND BETWEEN MIDDLEWEST TERRITORY

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 25th day of April, 1968.

No. 34971

Increased Rates and Charges, From, To, and Between Middlewest Territory

It appearing, That by order of the Commission dated March 29, 1968, in the above-entitled proceeding, an investigation was instituted into and concerning the lawfulness of the rates, charges, and regulations contained in the schedules described in said order:

It further appearing, That by order dated April 3, 1968, the Commission, among other things, directed the procedure which is to be followed in the above-entitled proceeding and required the submission of certain information and supporting data for the record on or before May 6, 1968, and scheduled the hearing to commence on May 20, 1968;

It further appearing, That by petition filed April 16, 1968, the Department of Transportation requests that the Commission order respondents to produce certain studies and underlying data prepared by Planning Research Corp., Midwest Research Institute and Pacific Research Corp.;

And it further appearing, That by request of April 12, 1968, the Department of Transportation and the General Services Administration requests that the procedural dates set forth in the order of April 3, 1968 be postponed for 90 days; and by letter dated April 22, 1968, respondents request that the time for filing and service of the information and data be extended to August 5, 1968, the hearing postponed to August 19, 1968, and that the hearing location be changed to Kansas City;

It is ordered, That the petition seeking the production of certain studies be, and, it is hereby denied, because the studies requested are not in the possession of respondents nor are they available to them;

It is further ordered, That the time for filing the requested information and supporting data be, and, it is hereby extended to August 5, 1968; that the hearing be, and, it is hereby postponed to August 19, 1968, conditioned upon respondents compliance with the refund provision ordered below; and that in all other respects, the Commission's order of April 3, 1968, remains in full force and effect (a decision will be made later as to the place of hearing);

And it is further ordered, That respondents be, and, they are hereby, ordered to make refunds to the shippers on any shipments moving after May 20, 1968, to the extent that the increases or any portion thereof under investigation herein are not approved by the Commission.

By the Commission.

/s/ H. Neil Garson
H. Neil Garson

(Seal) *Secretary*

Appendix B (4)

Served June 13, 1969

30459

INTERSTATE COMMERCE COMMISSION

No. 34971

INCREASED RATES AND CHARGES, FROM, TO AND BETWEEN MIDDLEWEST TERRITORY

Decided June 5, 1969

Increased motor common carrier class and commodity rates and charges, between points in middle western territory and between points in that territory and points in Illinois, Central States and southwestern territories, and Alaska and Canada, found not shown to be just and reasonable. Schedules ordered canceled, refunds required and proceeding discontinued.

John S. Fessenden, Andrew N. Happer, J. D. Lawson, George D. Michalson, and Roland Rice for respondents.

John M. Agrey, S. W. W. Carr, John A. DuPont, J. I. Finsness, Gordon Ganka, Clarence D. Smith, E. J. Hanson, John J. C. Martin, Marvin H. Morse, Stanford G. Ross, Jeffrey N. Shane, Leonard M. Shinn, Eugene P. Springer, and Gleen F. Wilman for protestants.

REPORT AND ORDER OF THE COMMISSION

By the Commission:

By schedules which became effective on April 1, 1968, the motor common carriers, hereinafter called respondents, participating in tariffs published by the Middlewest Motor Freight Bureau, Inc. (hereinafter called the Bureau), established increased class and commodity truckload and less-than-truckload rates and charges, for application between points in middle western territory and between points in that territory and points in Illinois, Central States, and southwestern territories, and Alaska and Canada. Upon protests by various parties,[1] by order of March 29, 1968, we instituted an investigation, without suspension, into the lawfulness on the proposed schedules. The rates under investigation will be referred to herein as the proposed rates, and the rates in effect prior to April 1, 1968, will be referred to as the present rates.

By order of April 3, 1968, the proceeding was set for hearing on May 20, 1968, special procedures were prescribed and certain information was called for (see appendix A). The order also provided that the proceeding would not be the subject of an examiners' recommended report and order because the circumstances required an expedited decision. After the order was served, there were requests both from respondents and certain protestants for

1. The protestants who participated in the hearing were: The Drug and Toilet Preparation Traffic Conference; the Chamber of Commerce of Lincoln, Nebr.; the Traffic Bureau of Sioux Falls, S. Dak.; the Chambers of Commerce of Fargo and Grand Forks, N. Dak.; the North Dakota Public Service Commission; the Public Utilities Commission of the State of South Dakota; the United States Department of Transportation; and the General Services Administration (on behalf of executive agencies except the Department of Defense).

postponement of the hearing date. The hearing was postponed to August 19, 1968, by order of April 25, 1968, conditioned upon respondents' compliance with an order to make refunds on shipments after May 20 to the extent the increases were not approved.

After oral hearing, briefs were received from respondents and from the Department of Transportation (DOT), the General Services Administration (GSA), the Drug and Toilet Preparation Traffic Conference, and jointly from the Nebraska State Railway Commission and Lincoln Chamber of Commerce. DOT and the Traffic Conference take exception to rulings of the hearing examiners refusing to exclude from the record certain of respondents' exhibits which were served upon the parties by fourth-class mail rather than by first-class mail as required by rule 22 of our General Rules of Practice. The rulings are affirmed for the reason that the cited rule is not necessarily exclusionary in purpose or effect; appropriate relief for any delay caused by use of fourth-class mail, such as a grant of time to prepare their cross-examination, was not requested by the protestants. However, the respondents are admonished that such evasion of the service requirements wil not be tolerated in the future. The Traffic Conference excepts without argument to certain other evidentiary rulings. Examination of the entire record reveals no prejudice to the rights of the parties and no substantial error in the rulings of the examiners, which are therefore affirmed.

The adjustment here proposed consists of an increase of 5 percent in rates and charges applicable to shipments weighing less than 5,000 pounds and 3 percent in rates and charges applicable to shipments weighing 5,000 pounds or more. Not all of the Bureau's tariffs are under investigation.

Section 216(g) of the act imposes on respondents the

burden of showing the proposed rates to be just and reasonable. The sole justification offered by respondents for the proposal is their alleged need for additional revenues. They characterize the proposal as "the familiar type of across the board territorial revenue adjustment." The issues which they recognize are (1) whether the anticipated additional revenues are needed by the carriers, and (2) whether the carriers have been operated honestly, efficiently, and economically.[2] Respondents claim that they need additional revenues to meet anticipated increased costs resulting from higher wage rates and to improve the general financial condition which, they claim, the results of past operations indicate they must do.

Increased costs.—Respondents contend that their proposal is fully justified by increases in expenses which resulted from new wage rates effective April 1, 1968. They introduced cost and traffic studies for selected groups of carriers, which studies purport to show the effect which the increased expenses would have upon the carriers' profit margins, as reflected in operating ratios. However, the entire presentation is based upon a restatement of the carriers' 1967 expenses at the anticipated 1968 wage level,

2. Section 216(i) of the Interstate Commerce Act (referred to by respondents on brief) provides that, "In the exercise of its power to prescribe just and reasonable rates, fares, and charges for the transportation of passengers or property by common carriers by motor vehicle, and classifications, regulations, and practices relating thereto, the Commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers; to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable such carriers, under honest, economical, and efficient management, to provide such service."

and respondents failed to show either the amount of the wage rates or the process by which their expenses were restated to reflect such rates. Respondents' cost witness made the statement that total expenses had been restated to reflect the higher wage rates and that the resulting increase was 3.8 percent. But the witness had not been responsible for the restatement, which was made on an individual basis by certain member carriers, not fully identified on the record. Some of the individual statements were tendered as exhibits but were withdrawn because no witness could stand cross-examination concerning them. Respondents clearly failed to produce substantial compliance with the first paragraph of the order for proofs (appendix A) to the extent that it called for "anticipated expense and revenue data to show the effect of the proposed increase."

We take official notice of a second round of wage increases, effective April 1, 1968, under a National Teamsters Union contract, the first round having taken effect 1 year earlier. Such increased wage rates have been the subject of evidence presented to us in our investigations of proposed motor carrier rate increases in other territories. However, the effect of such wage rates upon the total expenses and unit costs of the carriers is not measurable without more information than the mere fact of the new wage rates. A reliable restatement of expenses is essential to any cost justification of increased freight rates. We recently (February 14, 1969) found not justified one territorial rate increase because the restatement of expenses which was offered in that case was not sufficiently representative and reliable. *General Increase, Middle Atlantic and New England*, called the *Middle Atlantic* case, 332 I. C. C. 820, 834-5. In the proceeding now before us the restatement has not been presented for our examination, and it is impossible for us to say what net effect, if any, the new wage rates

will have on the carriers' profit margins. The respondents have failed to show increased costs sufficient to justify their proposals in whole or in part.

While the foregoing conclusions render unnecessary a detailed analysis of respondents' cost and traffic studies, the nature of their presentation requires additional comment. Respondents used the studies to compare 1967 operating ratios with those ratios which would have obtained on 1967 traffic at the anticipated 1968 level of expenses, the projected ratios being shown at both present and proposed rate levels. The showing is summarized as follows:

Operating ratios for study carriers for years 1967 and 1968

Operating ratio based upon (1)	Shipments weighing less than 5,000 pounds (2)	Shipments weighing 5,000 pounds or more (3)	All affected traffic (4)
	Percent	*Percent*	*Percent*
Present rates and actual 1967 expenses	97.3	87.6	94.0
Present rates and projected 1968 expenses	101.3	90.3	97.5
Proposed rates and projected 1968 expenses	96.4	87.7	93.5

Even if accepted, respondents' showing suggests on its face that the proposed increase is out of line on shipments weighing 5,000 pounds or more. This is so because the proposed increase on such shipments, produces a profit margin reflected by present and proposed operating ratios of 87.6 and 87.7, while shipments under 5,000 pounds are so rated as to produce an operating ratio of 96.4, and indicate that the latter category is not bearing its fair share of total carrier costs. *Middle Atlantic* case, *supra*, page 830. Moreover, respondents' study shows that the effect of continuing

the present rates at 1968 cost levels on shipments over 5,000 pounds would be to produce a 90.3 operating ratio on such traffic. Respondents offer no evidence indicating that a ratio of 90.3 reflects a gross profit margin that is too low.

Respondents' financial condition.—Respondents contend that the financial results of their past operations show that they are badly in need of additional revenues. To develop such a showing, they submitted a 7-year financial study of all 142 class I and class II resident members of the Bureau.[3] They also offered the opinion testimony of a consulting transportation economist, a banker, and an investment banker. They assert that motor carriers need revenues sufficient to provide (1) for 4-percent annual growth of undepreciated plant, (2) for the effects of inflation in replacing old assets with new in the amount of 3 percent of book cost of undepreciated plant annually, and (3) for dividends at the rate of 7 percent of net worth. Their cost witness presented an analysis of the 7-year finances giving effect to those assumptions, and "required" additional revenues were constructed from the analysis. This presentation constitutes respondents' attempt to comply with that portion of the order for proofs (appendix A) which calls for "evidence of the sum of money, in addition to operating expenses, needed to attract debt and equity capital which they require to insure financial stability and the capacity to render service." Respondents on brief characterize the quoted requirement as the "most significant" part of the order, being directed to the revenue need which "is the real heart of this case."

The essence of respondents' method of synthesizing their claimed revenue needs for 1967 is revealed in the following

3. Class I carriers are those having annual gross revenues exceeding $1 million; class II carriers, exceeding $300,000. Resident members are those performing through service under the tariffs in issue.

table, which is taken from their exhibit and which deals with those carriers who derive 75 percent or more from the tariffs in issue.

Respondents' constructive 1967 revenue needs for 19 carriers deriving 75 percent or more of their revenues from issues tariffs

Line No.	Item	Source	Amount (000)
	Financial data:		
1	Working capital	Annual report (AR)	$ 3,589
2	Carrier operating property	AR	47,908
3	Gross investment	lines 1 and 2	51,477
4	Long-term debt	AR	15,991
5	Total net worth	AR	17,679
6	Interest expense	AR	909
7	Rate of interest	line 6 ÷ 4	5.7%
8	Net deductions (includes interest)	AR	715
9	Total operating expense	AR	113,106
	Constructive revenue need:		
10	Growth (1)	4 percent of line 3	2,059
11	Debt portion	½ of line 10	1,029
12	Equity portion	½ of line 10	1,029
13	Inflation (2)	3 percent of line 3	1,544
14	Yield (3) (dividends)	7 percent of line 5	1,238
15	Net income after taxes	lines 12, 13, and 14	3,811
16	Net income before taxes	line 15 ÷ .55	6,929
17	Interest on debt growth	lines 7 X 11	59
18	Net operating income need	lines 8, 16, and 17	7,703
19	Revenue needed	lines 9 and 18	120,809

Source.—Exhibit 27, appendix D, page 3, column 8

(1, (2), and (3) relate to correspondingly numbered items in text, above.

As shown in the above table, respondents in effect contend that the study carriers needed 1967 revenues of $120,809,000, whereas, as shown in appendix B hereto, their actual revenues were only $115,619,000. Respondents' study likewise constructs deficiencies for each previous year to and including 1963 (see appendix B). But examination of the synthesis compels the conclusion that the claimed need for additional revenues is untenable. The claimed revenue need includes, in line 12 of the above table, $1,029,000 as the equity portion of a 4-percent annual growth in gross investment, and the amount claimed constitutes the equity

itself rather than a return on investment sufficient to attract equity capital. The method is in sharp contrast with the treatment of the debt portion of growth, as to which respondents claim only the amount necessary to pay interest on the increased debt. There is no basis upon which we could fairly conclude that the rate paying public should supply the respondents' growth equity capital; and we reject the proposition. In this connection, it should be noted that the amount of the claimed equity portion of growth constitutes 27 percent of the total claim for net after tax income (above table, line 15 ÷ 12).

More than 40 percent of the claimed after-tax net income is based upon the proposition that respondents need revenues sufficient to provide for 3-percent annual inflation in the cost of replacing old equipment with new. However, the 3-percent annual inflation rate was applied to the gross investment, which includes cash and other working capital and depreciation reserves. This merely repeats in a different form the contention that the shippers should supply investment dollars, and would improperly impose a future cost on current rate payers. The record does not afford a basis for approving a claimed revenue need. Moreover, the inflation item includes the debt financed portion of gross investment, whereas the servicing of that debt is already recompensed by the item of net deductions.

The reasons stated above are not exhaustive but they require the conclusion that respondents' synthesis of revenue needs has not been justified.

Return on investment.—The single most important gauge of a motor carrier's ability to attract equity capital is its return of value over and above the values the investors have committed to the enterprise. Two significant measures are the rate of return on stockholders' investment, and the rate of return on assets. Accordingly, our order for

proofs (appendix A) called for "experienced, projected, and needed rate of return on depreciated investment in transportation" and for "dividend and surplus" requirements.

The revenues of the carrier group are examined in appendix B on the basis of the resulting return of after-tax net income in relation to net worth. As there indicated, respondents represent that the returns of after-tax net income on shareholders' equity ranged from 5.6 to 19.1 percent in the period 1963 through 1967, for the group of carriers deriving their revenues over 75 percent from the tariffs in issue. However, those ratios are based on shareholders' equity at yearend which in each year was greater than at the beginning of the year; a closer approach to the return on the equity for the actual period of operation is reached by taking the average of the equity at the beginning and end of the year. *Middle Atlantic* case, *supra,* page 844, footnote. 1.

Also, respondents introduced a study of affiliate data which indicates that the profits of affiliates which they attribute to the carriers are equivalent to a reduction of half a point in the study carriers' operating ratios. Absent more information on affiliates, an approach to the ascertainment of the effect of affiliates' profits on carrier returns would be to reduce carrier expenses by half a percentage point, and the appendix includes such an adjustment. The range of actual after-tax return on equity becomes 9.2 to 24.8, when such adjustments have been made.[4]

Appendix B also shows that the revenues claimed by respondents to have been required would have produced

4. Such adjustment gives no consideration to the net worth of the affiliates which is not included in the net worth of the reporting carriers, or to the fact that the affiliates' profits are before taxes; the effect of those items cannot be ascertained on this record.

net income after taxes ranging from 22.6 to 27.7 percent of net worth, those ratios ignoring the effect of affiliates. In this connection, respondents' cost witness projected the ratios as ranging from 9.9 to 11 percent, but those ratios are invalid because they relate revenue needs based on actual net worth to a hypothetical net worth calculated at 3.5 times the claimed revenues. The inevitable result was to understate the ratio, and the amount of the understatement is indicated by the adjusted ratios above.

Respondents offered no showing as to the return on their rate base, although the order for proofs called for evidence as to the "needed rate of return on depreciated investment in transportation." However, the proffered financial history reveals their net investment (working capital plus depreciated carrier operating property), which approaches the appropriate rate base. In the following table (extracted from respondents' exhibit 27, appendix D) the average of such net investment at the beginning and end of each year is shown with the return of net income before interest and income taxes, as experienced and as sought. (In this table the increase in return due to affiliate operations, if any, is ignored.)

Ratio of net income before income taxes and interest to rate base of carriers which derived 75 percent or more of their revenues from issue tariffs.

Year	Rate base	Net income before taxes and interest[1]		Rate of return	
		Actual	Sought	Actual	Sought
		(000)	*(000)*	*Percent*	*Percent*
1963	$17,542	[2]$1,345	$5,325	[2]7.7	30.4
1964	19,327	3,995	5,796	20.7	30.0
1965	21,721	3,460	6,441	15.9	29.6
1966	27,451	4,007	7,285	14.6	26.6
1967	29,372	2,707	7,838	9.2	26.7

1. Amount reported for net income before income taxes plus amount reported for interest.

2. Reported net income before taxes was less than after taxes.

This record does not furnish sufficient information to ascertain what is a reasonable return on a rate base for these motor common carrier respondents. However, we hold that no justification has been shown for a return of more than 25 percent on the rate base, as claimed.

In only 1 recent year has the composite return on equity of the study carriers been less than 14.9 percent: In 1967 it was 9.2 percent. All the evidence indicates that 1967 was not a typical year. One of respondents' witnesses testified that 1967 was not a representative year because of unusual strikes that occurred. A witness for DOT testified that there was a drop in tons and ton-miles in 1967 which adversely affected productivity. Respondents' financial studies show that their profit margins improved substantially in the first quarter of 1968 as compared with the first quarter of 1967 (operating ratios of the 75-percent group went from 100 to 97.5) and this improvement took place prior to the effectiveness of either the proposed rates or the increased wages. Yet respondents offered no evidence or estimates as to traffic volume, past or prospective. Their projections simply assume 1968 traffic at the 1967 level. The record as a whole clearly precludes any approval of the proposals on the basis of the decline in earnings for 1967; furthermore, the evidence as to the earnings and financial condition of the respondents does not constitute a convincing showing of a need for higher rates.

The section 216(i) standards, which is set forth above, requires us to consider not only the need of the carriers for sufficient revenues but also the public need for adequate service at the lowest cost consistent therewith. The meeting point of those needs is sharpened at the present time by heightened dangers of inflation. It is not, therefore, enough to make an easy assumption that respondents' costs have gone up and that higher rates are warranted thereby. Our

duty requires closer examination and verification of alleged expenses, and ascertainment of their net effect, if any. This record does not afford sufficient information to perform that duty.

Carrier efficiency.—One other matter requires comment. Respondents called over 60 witnesses from individual carriers to testify generally to the practices followed and the improvements made for the purpose of increasing efficiency and reducing costs. The testimony is more impressive than that offered in a number of previous cases, and it is convincing as to the efforts made by these carriers to improve efficiency of operations. However, as above indicated, respondents have failed to present a sufficient showing with regard to the effect of the wage increase upon total expenses and unit costs of the carriers.

Ultimate Findings and Order

We find that the proposed increases have not been shown to be just and reasonable.

Commissioner Tuggle concurred in the result.

It is ordered, That the respondents herein be, and they are hereby, notified and required to cancel on or before July 21, 1969, the schedules described in the order entered herein on March 29, 1968, upon not less than 1 day's notice to the Commission and to the general public by filing and posting in the manner prescribed by the Commission under section 217 of the Interstate Commerce Act.

It is further ordered, That, in accordance with the order entered herein on April 25, 1968, the respondent' be, and they are hereby, required to refund to shippers the charges on shipments moving after May 20, 1968, to the extent

that such charges included the increases herein found not shown to be just and reasonable.

And it is further ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission.

H. Neil Garson
Secretary

(Seal)

APPENDIX A

Excerpt from Commission's order of April 3, 1968, showing what information was sought therein.

It is ordered, That respondents be, and they are hereby, notified and required to submit information and supporting data which shall include, among other things, actual expense and revenue data (including anticipated expense and revenue data to show the effect of the proposed increase or decrease) and operating ratios specifically related to the traffic and carriers involved, overall operating ratios, detailed data to establish the representative nature of the carriers used, and in addition, all pertinent evidence and supporting data for the individual representative carriers as they relate to their overall operations, and specifically to the traffic and territories involved.

It is further ordered, That the Commission will take official notice of all the respondent carriers' financial statements on file with the Commission.

It is further ordered, That the traffic studies to be submitted shall represent the most current period possible, and that they shall be based upon actual operations conducted during identical periods of time for each carrier; that the traffic studies shall be shown to be representative of the traffic covered by the rate proposal; and that the

traffic study be costed out and operating ratios determined by the individual weight brackets included within the rate proposal. If the two carrier groups described below under the development of costs are used, the traffic study shall be similarly separated. The revenues and costs for both groups shall also be totaled and operating ratios developed.

It is further ordered, That respondents shall produce evidence showing the total revenue earned for the services performed under the bureau's tariffs here under investigation for the most recent annual reporting period.

It is further ordered, That the cost study shall be based upon the most current annual reporting period adjusted to date. The costs may be developed for those carriers subject to the requirements for allocation of expenses between line haul and pickup and delivery in 49 CFR part 182, instructions 27 and 9002, whose total amount of revenue derived under the bureau's tariffs collectively is 75 percent or more of the total revenue derived by all carriers participating in those tariffs. If those instruction-27 carriers' revenue is less than 75 percent of the total, then all of the instruction-27 carriers should be used. These study carriers shall be selected from the participating carriers in descending order beginning with the carrier deriving the greatest dollar amount of revenue from those tariffs. Unit costs are to be developed separately for (1) those carriers who earn 50 percent or more of their revenues under the tariffs involved, and (2) those carriers who earn less than 50 percent. If factors similar to those published in appendix A to Highway Form B for the above two groups of carriers are not available, the published factors for the applicable territory based on the latest study are acceptable in the development of the unit costs.

It is further ordered, That both the cost study and the traffic study be adequately supported by working papers

to permit a complete check of the procedures followed and the results obtained.

It is further ordered, That respondents shall produce evidence of the sum of money, in addition to operating expenses, needed to attract debt and equity capital which they require to insure financial stability and the capacity to render service. This evidence should include, without limiting the evidence that may be presented, particularized reference to the respondents' reasonable interest, dividend, and surplus requirements and experienced, projected, and needed rate of return on depreciated investment in transportation.

It is further ordered, That all class I and class II motor carrier respondents shall submit detailed data regarding carrier-affiliate financial and operating relationships and transactions including, with respect to any and all individuals, partnerships, and corporations affiliated with respondents, when such transactions individually or in the aggregate amount to $2,500 or more during the year 1967, the following information:

1. Name of each affiliate from which respondent, during the year 1967, acquired, leased or purchased lands, buildings, equipment, materials, supplies, parts, tires, tubes, gasoline, oil, or other property or services used by respondent in its operations as a motor common carrier.
2. Kinds of property or service which each affiliate supplies to respondent.
3. Basis of charges for property or services supplied by affidavit to respondent including the base and rate for rental charges.
4. Total charges by each affiliate to respondent during the year 1967 for:
   a. Lease of vehicles.

b. Lease of terminals.
c. Lease of other property.
d. Pickup and delivery of shipments.
e. Repair and servicing of vehicles.
f. Management, accounting, financial, legal, purchasing, or traffic solicitation services.
g. Property sold by affiliate to respondent.

5. If the affiliate derives revenue from the sale or lease of property or from service through transactions with persons other than respondent, indcate the percentage of the revenue of such business to the total revenue of the affiliate in the year 1967.

6. A copy of the income statement for each affiliate for the year 1967 and the latest period of 1968 for which an income statement is available.

7. A statement listing the amount of wages, salaries, bonuses, and other compensation paid by the affiliate in 1967 to any individual who is also a respondent or an officer, director or substantial stockholder of a respondent; or the wife or close relative of a respondent or officer, director or substantial stockholder of a respondent.

8. The term "affiliate" as used in this order means:

a. Any individual who is also a respondent; an officer, director, or substantial stockholder of a respondent, or the wife or close relative either of a respondent, or of an officer, director, or substantial stockholder of a respondent.
b. Any partnership in which one of the partners is a respondent; an officer, director, or substantial stockholder of a respondent; or the wife or close relative either of a respondent; or of an officer, director, or substantial stockholder of a respondent.
c. Any corporation whose stock is wholly or partly owned by a respondent; by an officer, director, or substantial stockholder of a respondent; or by the

wife or close relative either of a respondent or of an officer, director, or substantial stockholder of a respondent.

d. Any corporation which exercises control over the operations or finances of respondent.

It is further ordered, That all of the required data specified in this order shall be based upon and reflect at least 1967 annual reporting period.

It is further ordered, That the Department of Transportation and the General Services Administration be, and they are hereby, notified and requested to submit, as part of their presentation, evidence which will (1) adequately support the allegations contained in their protests before the Board of Suspension including data showing the productivity of respondents, any increase in such productivity for at least the calendar year 1967, and the labor costs per unit of productivity; (2) show what financial indicators should be considered by the Commission in making its decision in this proceeding; (3) show to what extent the Commission should consider operating ratios, return on invested capital, and rate of return on stockholders' equity, in determining the revenue needs of respondents recognizing the differences which exist among the individual carriers both as to their financial conditions and their methods of operation; and (4) should the Commission adopt any of these as criteria, show what percentage or percentages should the motor carrier industry be allowed in order to maintain a healthy financial condition.

Appendix B (5)

30459

INTERSTATE COMMERCE COMMISSION

No. 34971

INCREASED RATES AND CHARGES, FROM, TO AND BETWEEN MIDDLEWEST TERRITORY

ORDER

Service Date

September 9, 1969

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 29th day of August, 1969.

No. 34971

Increased Rates and Charges, from, to and Between Middlewest Territory

Upon consideration of the record in this proceeding; the Commission's decision of June 5, 1969 (335 I. C. C. 142) requiring cancellation of the involved general rate increase and directing respondents, in accordance with an order herein of April 25, 1968, to refund to shippers increased rates collected on shipments moving after May 20, 1968; and the petition of respondents to vacate that portion of the order of June 5, 1969, requiring refund payments to shippers and request therein for reconsideration and/or reopening for further hearing filed on July 14, 1969; and the replies thereto filed by protestants Traffic Bureau of Sioux Falls on July 23, 1969, General Services Administration on August 4, 1969, jointly by Nebraska State Railway Commission and Lincoln Chamber of Commerce on August 4, 1969, jointly by Grand Forks Chamber of Commerce,

Chamber of Commerce of Fargo, and Public Service Commission, State of North Dakota, on August 11, 1969, Department of Transportation on August 18, 1969, and jointly by Drug and Toilet Preparation Conference and The National Small Shipments Traffic Conference, Inc., on August 18, 1969; and therefore:

It is ordered, That the petition be, and it is hereby, denied for the reason that sufficient grounds have not been presented to warrant granting the action sought; and that the respondents will hereinafter, in accordance with the said decision of June 5, 1969, make refund to shippers presenting their claims to the carriers supported by paid freight bills or other appropriate evidence.

By the Commission.

/s/ Andrew Anthony, Jr.
Andrew Anthony, Jr.
Acting Secretary

(Seal)

Appendix B (6)

30459

INTERSTATE COMMERCE COMMISSION

No. 34971

INCREASED RATES AND CHARGES, FROM, TO AND BETWEEN MIDDLEWEST TERRITORY

ORDER

Service Date November 6, 1969

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 27th day of October ....., 1969.

No. 34971

Increased Rates and Charges, from, to and Between Middlewest Territory

Upon further consideration of the record in this proceeding, including the Commission's decision of June 5, 1969 (335 I. C. C. 142) requiring cancellation of the involved general rate increase and directing respondents in accordance with an order herein of April 25, 1968, to refund to shippers increased rates collected on shipments moving during the specified refund period; and the order of August 29, 1969 denying prior petitions for reconsideration and vacation of the refund provision; and

It appearing, That on October 9, 1969, a petition for reconsideration of the decision as affirmed by the above-indicated denial order was filed by the respondents on the grounds that the instant petition is not successive but

properly lies because a new basis therefor has arisen by virtue of the Commission's decision in Ex Parte No. 249 (Sub-No. 1), *Informal Procedure for* Determining Reparation, 335 I. C. C. 403 (decided September 5 and served September 18, 1969);

And it further appearing, That a petition was also filed on October 9, 1969, by the Drug and Toilet Preparation Traffic Conference, Inc. (hereinafter referred to as the Conferences), seeking reconsideration solely of the said denial order of August 29, 1969, because it allegedly altered the method of refund payment from that set forth in the decision of June 5, 1969; wherefore:

It is ordered, That the respondents' petition be, and it is hereby, denied, because Ex Parte 249 (Sub-No. 1) is not relevant to the instant situation, wherein respondents had the burden of proving the lawfulness of the general increases.

And it is further ordered, That the Conferences' petition be, and it is hereby, denied, because the order of August 29, 1969, did not change the liability for making refunds, previously determined, but appropriately placed the burden for supporting claims for refunds upon the shippers who paid the charges.

By the Commission.

H. Neil Garson
Secretary

(Seal)

Appendix B (7)

30459

INTERSTATE COMMERCE COMMISSION

No. 34971

INCREASED RATES AND CHARGES, FROM, TO AND BETWEEN MIDDLEWEST TERRITORY

9485

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 18th day of June, 1970.

George M. Stafford,
Dale W. Hardin,
Kenneth H. Tuggle,
Rupert L. Murphy,
Laurence K. Walrath,
John W. Bush,
Virginia Mae Brown,
Willard Deason,
Donald L. Jackson,
Robert C. Gresham,

Commissioners.

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Admiral-Merchants Motor Freight v. *United States*,
C. A. No. C-2030 (D. Colo.)
(G.C. Memo No. 140-70)

INCREASED RATES AND CHARGES, FROM, TO AND BETWEEN MIDDLEWEST TERRITORY—No. 34971, 335 I.C.C. 142 (1969)

Voted to authorize the General Counsel to state to the district court in a motion to dismiss the action (Civil Action No. C-2030) or other appropriate pleading, that

the true basis of the shippers' right to a refund is their common law remedy for restitution, and further authorize the General Counsel to advise the Commission's staff accordingly as a guide in answering correspondence and other inquiries from shippers; Commissioners Tuggle, Murphy, and Walrath voting in the negative; Commissioners Bush, Jackson, and Gresham not participating.

Commissioner Tuggle suggested a defense to which Commissioners Murphy and Walrath agreed.

Appendix C (1)

IN THE UNITED STATES DISTRICT COURT
For the District of Colorado

Civil Action No. C-2030

Admiral-Merchants Motor Freight, Inc., Advance-United Expressways, Inc., All-American Transport, Inc., Badger Freightways, Inc., Barber Transportation Co., Bee Line Motor Freight, Brady Motorfrate, Inc., Briggs Transportation Co., Bruce Motor Freight, Inc., Burlington Truck Lines, Inc., Byers Transportation Company, Inc., C W Transport, Inc., Campbell "Sixty-Six" Express, Inc., Capitol Truck Lines, Inc., Cassell Truck Lines, Inc., Century Motor Freight, Inc., Chicago Kansas City Freight Line, Inc., Chippewa Motor Freight, Inc., Churchill Truck Lines, Inc., Clairmont Transfer Co., Crouch Bros., Inc., Crouse Cartage Company, Darling Transfer, Inc., Gateway Transportation Co., Inc., Glendenning Motorways, Inc., Graham Ship by Truck Company, Graves Truck Line, Inc., Green Bay-Chicago Lines, Gross Common Carrier, Inc., H & W Motor Express Company, Hart Motor Express, Inc., Hennis Freight Lines, Inc. of Nebraska, Hyman Freightways, Inc., Ideal Truck Lines, Inc., Mercury Motor Freight Lines, Inc., Mid-American Lines, Inc., Mid Continent Freight Lines, Inc., Middlewest Freightways, Inc., Midwest Motor Express, Inc., Minnesota-Wisconsin Truck Lines, Incorporated, Motor Transport Company, Murphy Motor Freight Lines, Inc., Navajo Freight Lines, Inc., Neuendorf Transportation Co., Orscheln Bros. Truck Lines, Inc., Premier Trucking Service Co., Raymond Motor Transportation, Inc., Ringsby Truck Lines, Inc., The Rock Island Motor Transit Company, J. L. Scheffler Transport, Inc., Sioux Transportation Company, Inc., Sturm Freightways, Inc., Takin Bros. Freight Line, Inc., Toedebusch Transfer, Inc., Twin City Freight, Inc., United-Buckingham Freight Lines, Inc., Werner Continental, Inc., Western Transportation Company, Witte Transportation Company, and Yellow Freight System, Inc., *Plaintiff's*,

vs.

United States of America and Interstate Commerce Commission, *Defendants*.

Appearances:

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Before Lewis, Chief Judge, United States Court of Appeals for the Tenth Circuit, Kerr and Doyle, District Judges.

MEMORANDUM OPINION AND ORDER

Doyle, District Judge

I. Facts

This is an action seeking judicial review of a Decision and Order of the Interstate Commerce Commission entered in that Commission's Docket No. 34971, *Increased Rates and Charges, From, To and Between Middlewest Territory*, 335 I. C. C. 397 (June 5, 1969), as modified by Order of August 29, 1969. Plaintiffs assert that insofar as that order purports to or does order them to refund certain portions of a disputed rate increase schedule, that portion of the order should be set aside and annulled, and the enforcement of it enjoined, as beyond the statutory authority and jurisdiction of the Commission.

The transactions leading up to the present controversy began when certain motor carriers of property, including plaintiffs herein, which were parties to and participated in

the tariffs of the Middlewest Motor Freight Bureau, Inc., filed and published schedules naming various increased rates and charges. These increases were scheduled to and did become effective on April 1, 1968. After various protests were filed to the increased rates, the Board of Suspension of the Interstate Commerce Commission declined either to suspend or investigate the increased rates and charges.[1] Upon reconsideration and referral to the entire Commission, it was ordered that an investigation be instituted into and concerning the lawfulness of said increased rates and charges. The Commission did not, however, order suspension of the new rate schedule.[2]

Thereafter, the Commission issued a number of procedural and intermediate notices and orders, including its Order of April 3, 1968,[3] specifying the evidence to be pro-

1. The matter at this stage was assigned Suspension Docket No. 47380.

2. Increased Rates and Charges, From, To and Between Middlewest Territory, I. C. C. No. 34971 (Order of March 29, 1968). The Relevant portions of Section 216(g) of the Motor Carrier Act, 49 U. S. C. § 316(g), provide:

> Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, charge, or classification for the transportation of passengers or property by a common carrier or carriers by motor vehicle. . . . the Commission is authorized and empowered upon complaint of any interested party or upon its own initiative . . . to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the Commission, by filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rule, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect.

3. Exhibit B to the Complaint.

duced at a hearing before certain Hearing Examiners, which hearing was ordered to commence on May 20, 1968.

On April 12, 1968, the Department of Transportation and the General Services Administration, which agencies had protested the increases and had been notified and requested by the Commission to furnish certain evidence, requested that the procedural date set forth in the Order of April 3, 1968, be postponed for 90 days.[4] Other protestants apparently did not join in this request. By letter of April 22, 1968, respondents in the investigative proceedings, including plaintiffs herein, also requested "that the date provided in the order of April 3 be postponed for a period of 90 days so that respondents' evidence would be due on August 5, 1968, and the hearing, presently set for May 20, 1968, would be reset to commence on August 19, 1968. The reason for this request [was] the physical impossibility

4. Prior to any formal request for a continuance, an informal meeting was held in the office of the Deputy Director of the Commission's Bureau of Proceedings—Mr. A. L. Corbin. According to the affidavit of Mr. J. D. Lawson, Executive Vice President of Middlewest Motor Freight Bureau at the time, Mr. Corbin asked Mr. Lawson at that meeting whether, if a postponement were granted, the carriers would agree to pay refunds, if the rate increases were not ultimately approved by the Commission. Both Mr. Lawson and counsel for the Middlewest Motor Freight Bureau responded that they had no authority to enter into any such agreement on behalf of the carriers and further stated their belief that the Commission lacked statutory authority to require refunds or to impose a refund agreement as a condition to the grant of a postponement. Affidavit of J. D. Lawson, Appendix B to Reply Brief of Plaintiff. Although Mr. Lawson states that no party requested the refund provision, Mr. John M. Cleary, Esq., also present at that meeting, states that the shippers took the position that they would have no objection to the continuance, if they could be assured that at the end of the proceeding refunds would be made to the extent the rates collected are not shown to have been just and reasonable. Affidavit of John M. Cleary, Intervenor's Exhibit C.

for respondents to compile the required data within the time allowed by the order."[5] In response the Commission issued an order which initially set forth the refund provision in controversy in the case at bar:

> *It is further ordered,* That the time for filing the requested information and supporting data be, and, it is hereby extended to August 5, 1968; that the hearing be, and, it is hereby postponed to August 19, 1968, conditioned upon respondents compliance with the refund provision ordered below. . . .
>
> *And it is further ordered,* That respondents be and, they are hereby, ordered to make refunds to the shippers on any shipment moving after May 20, 1968, to the extent that the increases or any portion thereof under investigation herein are not approved by the Commission.[6]

Five days later, on May 1, 1968, respondents (including plaintiffs herein) petitioned the Commission for reconsideration of the Order of April 25, 1968. They challenged the refund provision on many of the same grounds urged now in the case at bar. Subsequently, however, they withdrew this objection to the refund condition, grounding it on the decision of the Commission in a similar petition, Docket No. 34978, *Pacific Inland Territory,* Rate Increases, 1968.[7]

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5. Letter from Mr. John Fessenden, Counsel for Respondents and Middlewest Motor Freight Bureau to Mr. Alvin L. Corbin of the I. C. C., April 22, 1968, Plaintiffs' Exhibit 1(b).

6. Order of April 25, 1968, Exhibit "C" to the Complaint.

7. Increased Rates and Charges, Pacific Inland Terr., 332 I. C. C. 845 (Feb. 13, 1969). According to Intervenor's Brief, respondents in that case refused to comply with a refund condition, and the Commission vacated the order granting a 90-day postponement of the hearing date. The Commission felt that respondents in that case should have been prepared and ready to submit evidence to prove the lawfulness of their proposed tariff changes when the sched-

They further stated that evidence in support of the rates in the Middlewest Territory case could not be compiled by the original hearing date of May 20, 1968. This left the order of April 25, 1968 standing as issued. Subsequent to this withdrawal of the Petition to Reconsider, several protestants in the proceeding advised the Commission by letter that they were not satisfied with a mere withdrawal of the objection to the refund provision, as any guarantee of compliance with the Commission's refund provisions.[8] These objections proved to be prophetic.

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ules containing those charges were filed with the Commission. *See also*, General Increase, Middle Atlantic and New England, 332 I. C. C. 820 (Feb. 14, 1969).

8. For example, the following letter was addressed to Mr. H. Neil Garson, Secretary, Interstate Commerce Commission, signed by Mr. J. A. DuPont, Manager, Transportation Department, Lincoln Chamber of Commerce, May 7, 1968 (Plaintiffs' Exhibit 1):

> Dear Mr. Garson:
>
> This Protestant is not satisfied that the Respondents' letter, dated May 2, merely withdrawing their May 1, 1968 petition for reconsideration, is any guarantee of compliance with the Commission's refund provisions of its April 25, 1968 order.
>
> . . . If the Protested rates and charges are ordered cancelled, we see a distinct possibility of the Respondents dragging the refund provision through every court in the land before making any actual refunds as contemplated by the Commission. Perhaps some sort of bond covering shippers' monies subject to possible refunds is in order.
>
> Your Protestant believes that the shipping public is entitled to a specific commitment from the Middlewest Motor Freight Bureau that they will abide by the Commission's refund provision paragraph in its April 25, 1968 order. Unless such a commitment can be obtained from the Respondents, it is our position that the earlier procedural dates prescribed in Docket No. 34971 on April 3, 1968, should be reinstated so that this important investigation may promptly proceed.
>
> Sincerely,

No action was taken with respect to this issue until after the postponed hearing on the merits at which time the Commission issued its decision in the matter. In its Report and Order of June 5, 1969, the Commission found that the increased rates and charges "have not been shown to be just and reasonable", ordered them cancelled, and "*further ordered,* That, in accordance with the order entered herein on April 25, 1968, the respondents be, and they are hereby, required to refund to shippers the charges on shipments moving after May 20, 1968, to the extent that such charges included the increases herein found not shown to be just and reasonable."[9]

Thereafter, the respondents filed a petition to vacate that portion of the Order of June 5, 1969, which required the payment of refunds, and sought reconsideration of the refund order and/or reopening of the subject proceeding for further hearing. Meanwhile, cancellation was made of the disputed increases on statutory notice, effective August 31, 1969, and simultaneously, on statutory notice, respondents filed new and higher increases of six per cent to become effective on September 1, 1969. Following various protests, the Board of Suspension declined to suspend or to investigate the new rate increases. On appeal, the entire Commission: (1) entered its order declining to suspend or investigate the September 1 increases, and (2) entered its order denying respondents' petition to reconsider and vacate the refund order. The Commission further ordered,

> that the respondents will hereinafter, in accordance with the said decision of June 5, 1969, make refund to shippers presenting their claims to the carriers supported by paid freight bills or other appropriate evidence.[10]

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9. Increased Rates and Charges, From, To and Between Middlewest Territory, 335 I. C. C. 142 (June 5, 1969).

10. Increased Rates and Charges, From, To and Between Middlewest Territory, I. C. C. No. 34971 (Order of August 29, 1969).

A second Petition for Reconsideration of the Order of June 5, 1969, as affirmed by the Order of August 29, 1969, was denied by the Commission by Order of October 27, 1969. Thus, the increased rates were collected from April 1, 1968 to August 31, 1969. The Order to Refund is, however, effective from May 20, 1968 to August 31, 1969.

II. Jurisdiction.

This being an action to enjoin or set aside an order of the Interstate Commerce Commission, jurisdiction is vested in the United States District Courts by 28 U. S. C. § 1336(a) and Section 17(9) of Part I of the Interstate Commerce Act, 49 U. S. C. § 17(9), the latter section being made applicable to Part II of the Interstate Commerce Act (Motor Carrier Act) by Sections 205(g) & (h) of the Motor Carrier Act, 49 U. S. C. §§ 305(g) & (h).[11] Jurisdiction of a three-judge district court is alleged under 28 U. S. C. § 2325, and such a court has been convened to hear the matter as provided by 28 U. S. C. § 2284.

The United States of America, as statutory defendant in this proceeding,[12] and the Interstate Commerce Commission (both defendants hereinafter referred to as the Government) have challenged the jurisdiction of this Court over the subject matter of this action and have challenged the propriety of a three-judge court.

It is to be noted though that the Government in questioning the jurisdiction of this Court to review the case did so as a preliminary matter. We have heard the case as a three-judge court, and the three participating judges have subscribed to the opinion and decision.

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11. *See also* Sections 10(a) & (b) of the Administrative Procedure Act, 5 U. S. C. §§ 702 & 703.

12. *See* 28 U. S. C. § 2322.

We are mindful that 28 U. S. C. § 2312 calls for a somewhat different review procedure in actions "for the payment of money or the collection of fines, penalties and forfeitures." However, we do not regard this case as an action for the payment of money. Its primary concern is the effort of the Commission to uphold and protect its jurisdiction.

It may possibly be that the decision of this Court will have some effect on the effort of the shippers here to obtain refunds. Nevertheless, the instant review is not to be classified as an action to enforce the payment of money or the collection of fines, penalties and forfeitures. The plaintiffs have brought the suit here seeking annulment of an order of the Commission. Because of the high importance of the case we feel duty-bound to entertain the suit and to determine it on its merits. We therefore reject these questions concerning our jurisdiction.[13]

III. Issue

We must decide whether an order of the Commission in which a rate increase is denied, which order directs repayment of interim rates, if determined to be invalid, and which refund order was entered by the Commission as a condition of granting an extension of time to the carriers at their request, is invalid and subject to a judgment annulling the same. We are not involved with the Commission's order denying the increase. We are limited to the propriety and validity of a conditional rate refund order, which order was tacitly or impliedly (by withdrawal of objection) accepted by the carriers, plaintiffs herein.

13. We have considered United States v. I. C. C., 337 U. S. 426, 69 S. Ct. 1410 (1949). The Supreme Court was there speaking of a wholly different kind of case. That had to do with statutory reparations. It was correctly held to be an action only for the collection of money.

IV.

All of the parties appear to be in agreement that the relevant statutory provisions do not vest the Commission with authority to order the payment of refunds. The basic statute, 49 U. S. C. § 316 *et. seq.*, requires motor carriers to establish "just and reasonable rates" to be charged to shippers of goods. These rates are established by filing with the Commission tariffs setting forth the rates, fares and charges to be applied and the publishing of these in accordance with the rules of the Commission. These rates go into effect unless the Commission suspends, cancels or otherwise prevents their becoming effective, and upon their becoming effective they become legal if not lawful rates.

There are remedies provided to aggrieved shippers. Indeed, the Commission itself under Section 216(g) of the Act, 49 U. S. C. § 316(g), may on its own initiative enter into a hearing concerning the lawfulness of the rate, fare, charge, etc. Pending such a hearing the Commission may from time to time suspend the operation of such schedule.

It is to be noted that there is a refund provision applicable to railroads. This is § 15(7) of the Act, 49 U. S. C. § 15(7). No similar provision is found in § 216(g) of the Act granting this kind of express authority with respect to the rates of motor carriers.

Similarly, under Part I of the Act there is a reparations procedure applicable to railroads, 49 U. S. C. §§ 8 and 9. Here there is, however, a procedure applicable to motor carriers, although it has not been invoked in the present case. This measure was adopted in 1965, and prior thereto the Commission had fashioned a reparations procedure without the aid of a Congressional statute. They based it on the theory that a common law remedy survived the passage of the Interstate Commerce Act. The court in which the action was brought referred the issue of the unreasonable-

ness of the rates to the Commission. However, the Supreme Court voided this procedure in the case of *T. I. M. E., Inc.* v. *United States*, 359 U. S. 464, 79 S. Ct. 904, 3 L. Ed. 2d 952 (1959). It was held in the *T.I.M.E.* case that Part II of the Interstate Commerce Act gave no right to past unreasonableness of rates. Thereupon, Congress amended Part II of the Act so as to restore the reparations procedure which had obtained prior to the Supreme Court decision.[14] Under this the Commission had the authority to make an after-the-fact determination as to whether past rates alleged to be unlawful were indeed injust and unreasonable, and also to determine the extent of the unreasonableness.[15]

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14. The amendment is set forth in 49 U. S. C. § 304a(2), (5). Although the amendment does not explicitly set forth the procedure to be used in awarding reparations, the legislative history makes it clear that Congress intended to restore the procedure formerly utilized by the Commission pursuant to the policies which it articulated in Bell Potato Chip Co. v. Aberdeen Truck Line, et al., 43 M. C. C. 337 (1944).

For example, the House Committee report states:

> In effect, these sections would permit a court of competent jurisdiction to award reparations to persons injured through violations of the Interstate Commerce Act by motor carriers and freight forwarders subject thereto. This would be accomplished in accordance with established judicial reference procedures under which the Commission would be called upon to aid the court by making necessary administrative determinations relating to the amount of reparations. This would restore a procedure formerly available to shippers which was set aside by the Supreme Court in 1959 by its decision in the *T.I.M.E.* case. . . .

H. R. Rep. No. 253, 89th Cong., 1st Sess. 12 (1965)—Report to accompany H. R. 5401. *See also* S. Rep. No. 387, 89th Cong., 1st Sess. 8 (1965)—Report of the Committee on Commerce to accompany S. 1727. For legislative history see 2 *U. S. Code Cong. & Adm. News* 2923 (1965).

15. 49 U. S. C. §§ 304a(2), (5) and 316(e).

It is abundantly clear, therefore, that Congress has not authorized the Commission to order refunds as a generally accepted procedure. It is also clear, however, that the Commission did not undertake to exercise any such power nor is this a reparations proceeding such as that which was condemned in the *T.I.M.E.* case. Indeed, we do not view the present action of the Commission as an effort to exercise *any* general authority. The order in question was instead issued incident to a request for a continuance and indeed was not unlike the exercise of the suspension power which the Commission has and had under 49 U. S. C. § 316(g). No doubt the Commission could have ordered the rates suspended at least for a period of time (seven months).

It is strongly suggested that there is a *common law* power of restitution here, and in support of that the Government cites *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80 (1943). However, there the Securities Exchange Commission was empowered to consider equitable principles in making its decision. As we view it, a legislative tribunal cannot exercise common law or equity jurisdiction unless this authority is expressly granted by the Congress. But in the present case the Commission did not undertake to apply substantive common law or equity principles. The matter with which it was concerned, that is the granting of an extension of time, was purely procedural. A specific grant of equity jurisdiction was not therefore essential to the imposition of this condition.

An even stronger argument for refusal to annul the Commission's order is the doctrine of equitable estoppel. We have in mind the principle which imposes an obligation on a person to live up to his representations or conduct in circumstances where inequitable consequences would result to persons having the right to rely, and who in good faith

did rely on the representations made.[16] Applied to the case at bar the Commission certainly relied on the carriers' withdrawal of their jurisdictional objection to the refund condition. The Commission's reliance was evidenced by its failure to vacate the order. It did not have to anticipate that the carriers would renege. The carriers' withdrawal of their timely objection was a positive act which evidenced willingness to go along with the condition imposed.

It can also be argued that there was a binding waiver on the part of the carriers resulting from their affirmative withdrawal of their objection. A principle similar to this was applied in *Texaco, Inc.* v. *FPC*, 290 F. 2d 149 (5th Cir. 1961), where gas producers sought to have refund conditions vacated in temporary certificates of public convenience and necessity, which certificates had been awarded by the FPC. Here the producers had not contested the refund provisions at the time of the awards, but only after the FPC required that they be paid. In denying relief to the producers the court stated that the time for the producers to raise the question was before they accepted the certificates with the conditions attached. The FPC had general refund authority, but it does not appear from a reading of the case that they were exercising it in this instance, and the court's decision appears to have been based on the conditional issuance of the certificates.

The Court of Appeals for the Eighth Circuit has recently decided a case which is somewhat analogous to that at bar. *Middlewest Motor Freight Bureau, et al.* v. *United States*, No. 19,870 (8th Cir., October 6, 1970). The question was whether shippers were entitled to *restitution* from carriers

16. Robinson v. Comm'r of Internal Revenue, 100 F. 2d 847, 849 (6th Cir. 1939). There are, of course, narrower definitions of the concept.

for rates charged during the existence of a court-imposed temporary restraining order, which restraining order prevented the operation of a Commission order cancelling carrier rates which were determined by the Commission as not shown to be just and reasonable. Although the Court of Appeals, requiring restitution in that case, viewed the power of the court to order restitution as concomitant with the traditional equity powers of the court to issue injunctions, it also held a rate that is not shown to be just and reasonable to be unlawful, at least from the time the Commission orders it cancelled. The court stated that requiring the shippers to resort to the statutory reparations procedure was requiring double litigation which was an unwarranted burden on the Commission's resources. The court further noted that allowing restitution was not permitting the Commission to accomplish indirectly what it could not accomplish directly, but was merely giving effect to the Commission's order of cancellation—an order which was clearly within its power. These latter considerations seem particularly applicable to our case.

We are unable in good conscience, in view of the circumstances presented, to annul the order of the Commission. The Commission was acting in good faith in granting the extension, and the carriers were at the time agreeable to acceptance of the benefits of such an extension order. Their present posture appears to us to be grossly inequitable and not deserving of court intervention. While we do not commend the procedure as one which should be or could be practiced; we do hold that the peculiar facts of this case, arising as they did, are such as to not justify the granting of the relief requested, namely annulment of the Commission's order and approval of the carriers' conduct.

The practical effect of this ruling is not before us since this is not an enforcement proceeding.

We conclude that the complaint and the cause of action herein be and the same are hereby dismissed.

Dated at Denver, Colorado, this 14th day of January, A. D. 1971.

By the Court:

/s/ David T. Lewis
David T. Lewis
Chief Judge
United States Court of Appeals

/s/ Ewing T. Kerr
Ewing T. Kerr
Judge
United States District Court

/s/ William E. Doyle
William E. Doyle
Judge
United States District Court

Appendix C (2)

No. 70-157. ADMIRAL-MERCHANTS MOTOR FREIGHT, Inc., et al., Appellants, v. UNITED STATES, et al.

404 US 802, 30 L Ed 2d 37, 92 S Ct 51.

October 12, 1971. Appeal from the United States District Court for the District of Colorado. Judgment affirmed.

Same case below, 321 F Supp 353.

Appendix C (3)

No. 70-157. ADMIRAL-MERCHANTS MOTOR FREIGHT, Inc., et al., Appellants, v. UNITED STATES et al.

404 US 987, 30 L Ed 2d 371, 92 S Ct 443.

December 7, 1971. Petition for rehearing denied.

Former Decision, 404 US 802, 30 L Ed 2d 37, 92 S Ct 51.

APPENDIX D (1)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

Name of Presiding Judge, Honorable Richard B. Austin

Cause No. 72-C-996 Date May 30, 1972

Title of Cause – Container Corp. v. Admiral-Merchants

The motion of defendants to dismiss the complaint is granted. A cause does not lie under 49 U.S.C. §16(2) because the suit was not brought within one year of the date of the I.C.C. order as required by 49 U.S.C. §16(3)(f). An action for restitution does not lie because there are no allegations of diversity or jurisdictional amount. While plaintiffs brought the suit within two years of the I.C.C. order and therefore a reparations action under 49 U.S.C. §304a might have been proper, the complaint does not plead a reparations action.

APPENDIX D (2)

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

September Term, 1973 September Session, 1973

No. 72-1646

CONTAINER CORPORATION OF AMERICA and MONTGOMERY WARD & CO., INCORPORATED,

Plaintiffs-Appellants,

v.

ADMIRAL MERCHANTS MOTOR FREIGHT, INC., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 71 C 996

RICHARD B. AUSTIN
Judge.

ARGUED October 25, 1973 – DECIDED December 11, 1973

Before CUMMINGS and STEVENS, *Circuit Judges,* and CAMPBELL, *Senior District Judge.**

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*Senior District Judge William J. Campbell of the Northern District of Illinois, sitting by designation.

STEVENS, *Circuit Judge*. This is an action in which two shippers seek to recover refunds for overcharges on shipments moving after May 20, 1968, and before September 1, 1969, from several motor carriers. The district court thought the action barred by the one-year limitations provision of § 16(3)(f) of the Interstate Commerce Act, 49 U.S.C. § 16(3)(f). We do not agree.

Plaintiffs' claims are authorized by § 16(2) of the Interstate Commerce Act, 49 U.S.C. § 16(2)[1], as construed by this court in *Aluminum Company of America v. Admiral Merchants Motor Freight, Inc.*, ____ F.2d ____ (July 12, 1973). Only a few of the complex circumstances of this litigation are relevant for our decision.[2]

The refund obligation was originally described in an order entered in Docket No. 34971, the proceeding entitled "Increased Rates and Charges From, To and Between Middlewest Territory," on April 25, 1968.[3] On that date, acting on a request from the carriers and certain other parties, the Commission postponed a hearing on the lawfulness of the carriers' proposed rates conditional upon respondents' compliance with an order "to make refunds to the shippers on any shipments moving after May 20, 1968, to the extent that the increases or

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[1]Section 16(2) provides, in part:

"If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made may file . . . a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises."

[2]For a further description of the factual background of the litigation see Judge Will's opinions in *Bela Seating Co. v. Advance Transportation Co.*, 344 F.Supp. 854 (1972), and *Aluminum Co. of America v. Admiral Merchants Motor Freight, Inc.*, 337 F. Supp. 674 (1972). See also *Admiral Merchants Motor Freight, Inc., et al. v. United States*, 321 F.Supp. 353 (D. Colo. 1971), *affmd.* 404 U.S. 802, *rehearing denied* 404 U.S. 987.

[3]At oral argument, counsel for the plaintiffs stated that the carriers agreed to this condition in order to obtain a continuance of the hearing date which had originally been set for May 20, 1968.

any portions thereof under investigation herein are not approved by the Commission."[4]

After a full hearing, on June 5, 1969, the Commission found that the carriers had not sustained their burden of proving that the proposed increases were just and reasonable, ordered the rates cancelled, and, in accordance with the conditional refund order entered on April 25, 1968, further ordered that the carriers "be, and they are hereby, required to refund to shippers the charges on shipments moving after May 20, 1968, to the extent that such charges included the increases herein found not shown to be just and reasonable."[5]

On August 29, 1969, the Commission denied a petition by the carriers to reconsider and vacate the refund provision of the June 5, 1969, order. The August 29, 1969, order supplemented the language of the June 5 order by directing the carriers to "make refund to shippers presenting their claims to the carriers supported by paid freight bills or other appropriate evidence."[6] The carriers filed another petition for reconsideration which the Commission denied on October 27, 1969.

The carriers then sought judicial review of the validity of the Commission's order. On January 26, 1970, the carriers filed a complaint in the United States District Court for the District of Colorado seeking a declaration that the Commission order was invalid, and an injunction against enforcement of the refund obligation. On June 19, 1970, that court granted a motion for a temporary restraining order; enforcement of the

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[4]See final paragraph of the order which is attached to the complaint as Exhibit 1.

[5]335 ICC 142, 151 (Ex. 2 to the complaint).

[6]In our opinion in *Alcoa, supra*, we described the August 29, 1969, order as the Commission's "final order." That reference was merely descriptive and did not purport to resolve a dispute as to the date the carriers' obligation became enforceable for purposes of the statute of limitations. Similarly, our decision in the present case on the date of finality of the Commission's order for limitations purposes does not decide the date upon which interest commenced to accrue on the refunds.

Commission's order was stayed until further order of court. Except for a period of about seven weeks, a stay order was in effect until the judicial proceedings were terminated in both the United States Supreme Court and the United States Court of Appeals for the Tenth Circuit. On December 7, 1971, the Supreme Court denied rehearing of its affirmance of the decision of the three-judge court in Colorado upholding the Commission's order; the stay of the ICC order was lifted on December 27, 1971. On January 7, 1972, the Secretary of the Interstate Commerce Commission filed a formal notice advising interested parties that its refund order "is now fully effective and enforceable at the suit of the affected shippers."

Section 16(3)(f) of the Interstate Commerce Act provides:

> "A complaint for the enforcement of an order of the Commission for the payment of money shall be filed in the district court or the State court within one year from the date of the order, and not after."

Plaintiffs filed their complaint in the present case on April 27, 1971, well before judicial review of the Commission's order had been completed, but more than a calendar year after the Commission had entered its order directing the refund. The question before us is, when did the Commission's order become final for purposes of § 16(3)(f)? The defendants argue that the date of the order is June 5, 1969, the date on which, after a full hearing, the Commission found that the carriers had not sustained their burden of proving their proposed rate increases were just and reasonable.

The plaintiffs offer alternative theories. First, they suggest that "within one year from the order, and not after" means one year from the date fixed for compliance with the Commission's order, and not one year from the time the Commission issues its order. Since the Commission did not prescribe a date on which the carriers would become obligated to pay, specifying rather that the obligation would arise when shippers presented carriers with paid freight bills or other evidence, the dates on which they presented their bills[7] are the determinative dates, provided that they acted within a reasonable time.

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[7]The bills were presented early in 1971. Brief for appellants at 4.

Alternatively, the plaintiffs argue, in accord with the reasoning of Judge Will in *Bela Seating Co. v. Advance Transportation Co., supra*[8] that the stay of the Commission's order granted in Colorado tolled the statute of limitations, because the Commission's order was unenforceable during the pendency of the stay.[9]

We think that none of those arguments offers the most reasonable interpretation of the statute in the circumstances of this case. In our opinion the "date of the order" within the meaning of §16(3)(f) is the date on which the litigation prosecuted by the carriers to obtain judicial review of the Commission's order was completed. For that litigation was in effect after a continuation of the carriers' efforts to persuade the Commerce Commission itself to modify or set aside its original refund order.

In this case, the judicial proceedings did not result in any material change in the Commission's order. However, it was possible that the carriers might persuade the reviewing court to set aside, annul, or sustain, in whole or in part, the order of the Commission.[10] Had the order been changed, an aggrieved party might not even have been able to prepare or file a proper action until after the court's decision became final. It would be anomalous to hold that a Commission order is final before judicial review is completed if, but only if, review leaves the Commission's order undisturbed.

No statutory policy would be served by requiring shippers to incur the expense and inconvenience of filing protective

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[8]We are advised that a similar decision was rendered in an unpublished opinion in *Container Corporation of America and Montgomery Ward & Co., Inc. v. Hart Motor Express, Inc.*, D. Minn., November 20, 1972. Reply brief for appellants, at 1-4.

[9]At oral argument, counsel for the plaintiffs offered a third argument. They suggested that the statute of limitations was tolled by the filing of a class action on June 15, 1970, in *Appleton Electric Co. v. Advance United Expressways* in the District Court for the Northern District of Illinois.

[10]*Cf.* 28 U.S.C. §1336(a).

suits prior to the termination of the judicial proceedings initiated by the carriers to review the legality of the Commission's order.[11] This conclusion is buttressed by the basic policy to ensure uniformity in treatment of shippers. See *Midstate Horticultural Co. v. Pennsylvania Railroad Co.*, 320 U.S. 356, 361.[12] This policy would not be served by allowing recovery to shippers who were prudent enough to file claims during the period of uncertainty, and denying recovery to those who justifiably awaited the final determination of the order's validity and enforceability.

It might be suggested that, since an order of the Commission does achieve a finality to which the statute of limitations applies if judicial review is not taken, time should be computed from the date of the Commission's order and judicial review should merely toll the statute for the period of its pendency. Such a rule would effectively shorten the time

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[11] In support of their motion for a stay of the Commission's order pending appeal to the United States Supreme Court, the carriers made the following statement:

> "The stay sought herein is necessary also, in order to prevent irreparable injury and damage to that portion of the shipping public with which the Plaintiffs were doing business between the dates of May 20, 1968, and September 1, 1969. These shippers would, otherwise, have to calculate and file claims for the respective amounts due them pursuant to the Commission Order, and, in the event that the Commission Order were ultimately found invalid, would have to repay those amounts to the carriers involved; both such actions by the shippers would, of course, involve considerable expense not recoupable by them from any source."

See pages 3-4 of Motion for Stay filed on March 5, 1971, in the United States District Court for the District of Colorado in Civil Action No. C-2030.

[12] The policy of § 16 to secure promptness in collection claims is entirely consistent with our conclusion. The carriers' adamant resistance to performance of their obligation to refund the over-charges rendered inapplicable any statutory concern with "promptness in collection" prior to the determination of judicial proceedings. Inaction of the shippers prior to that date did not result in any postponement of the time when the refunds would actually be collectible.

Congress has authorized for plaintiffs to prepare and file their lawsuits. During the pendency of judicial review, which, as this case demonstrates, may last for a period of years, a suit which had been partially prepared may atrophy: employees change jobs, different counsel may be retained, and pertinent records may be refiled or needed for other purposes. To require plaintiffs in complex matters either to commence protective litigation, or to act within a matter of months or weeks, is inconsistent with the congressional decision to allow shippers one year in which to file suit to enforce a final order of the Commission. In our opinion, the carriers' obligation to refund the excess charges did not "begin to enjoy the shelter of the statute of limitations"[13] while they were prosecuting an action under 28 U.S.C. §1336(a) to set aside or annul, in whole or in part, the Commission's order. We therefore hold that §16(3)(f) did not begin to run until the judicial review sought by the carriers was concluded and the stay which had been entered by the district court in Colorado was lifted.

It follows that the instant case was filed by plaintiffs even before the applicable statute of limitations began to run. The order dismissing the complaint is reversed and the case remanded for further proceedings.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

[13]The quotation is from *Woods v. Stone*, 333 U.S. 472, 474.

SUPREME COURT, U. S.

FEB 15 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1125

ADMIRAL-MERCHANTS MOTOR FREIGHT, INC., ET AL.,
Petitioners

v.

CONTAINER CORPORATION OF AMERICA, and MONTGOMERY WARD & CO., INCORPORATED, *Respondents*

MOTION TO DEFER CONSIDERATION OF PENDING PETITION FOR WRIT OF CERTIORARI

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MOTION TO DEFER CONSIDERATION OF PENDING PETITION FOR WRIT OF CERTIORARI

Petitioners, through counsel, respectfully move this Honorable Court to defer consideration of the pending Petition for a Writ of Certiorari in the above-entitled cause for the reasons set forth in detail hereinafter.

As stated in the Petition for a Writ of Certiorari, this proceeding is one of a series of lawsuits at various stages of litigation (See Appendix A) involving an Interstate Commerce Commission order entered against certain motor carriers, parties to named tariffs of the Middlewest Motor Freight Bureau, requiring those carriers to refund to shippers a certain portion of the rates charged during a fifteen month period ending August 30, 1969. The cases aforesaid are being liti-

gated and decided on various issues and differing theories of law in many forums, and at least several of them should reach this Honorable Court either singly or in consolidated form as the appeals below are determined. For this Court to be asked to consider these proceedings on a piecemeal case-by-case basis is to create unnecessary duplication and waste of the Court's time. To prevent this, then, and to seek a forum for evaluation of the total situation is the thrust of Petitioners' present Motion to Defer Consideration of their petition pending completion of the appeals below and the consolidation here of those causes susceptible of such treatment.

A petition in this Court for a writ of certiorari to the U. S. Court of Appeals for the Seventh Circuit involving the same order of the Interstate Commerce Commission giving rise to the instant claims is expected soon in a recent case (*Appleton Electric Company* v. *Advance-United Expressways, et al.*, No. 70 C 1427, decided January 16, 1974). *Appleton* has been determined to be appropriately a class action (Rule 23 F.R.C.P.) by the Seventh Circuit, which, if affirmed by this Court prior to its consideration of those companion cases now being briefed, consolidated and argued in the Eighth Circuit, would create added legal and administrative burdens and expenses for those shippers and carriers whose I.C.C. refund order cases are before that Circuit Court.

The cases now before the Eighth Circuit present questions involving statutory construction which have not yet been finally decided by this Court and which are presently before the Court in *A & B Transfer, Inc., et al.* v. *S. S. Kresge Company,* No. 73-1056, Petition for a Writ of Certiorari to the U. S. Court of Appeals

for the Sixth Circuit. It is respectfully submitted that the Court may have been persuaded to issue the Writ of Certiorari prayed for in *Admiral-Merchants Motor Freight, Inc., et al.* v. *Aluminum Company of America,* No. 73-669, denied December 17, 1973, if the total import of the questions involving the I.C.C. refund order which have been and are being litigated in the Sixth, Seventh and Eighth Circuits had been before the Court at that time. The powers of the I.C.C. and the lower courts to rewrite the Interstate Commerce Act, by incorporating Part I rights (§ 16(2)) into Part II through the use of § 305(g) language, contrary to the express intent of Congress and this Court (*T.I.M.E., Inc.* v. *United States,* 359 U.S. 464 (1959), and the amendment of the Act in response thereto) should be delineated here by the Court to set at rest the questions of statutory interpretation and agency authority raised and not yet answered conclusively by the so-called "refund" cases. Without a well-defined statement of the law as it applies to the motor carrier industry, shippers and carriers alike will be faced with a lack of certainty as to their rights and remedies when forced to rely on the many opinions rendered heretofore in these cases.

This Honorable Court should be afforded an opportunity to decide the question of the grant or denial of a Writ of Certiorari having before it for review all of the questions of law and statutory interpretation then outstanding in cases arising from the Commission's refund order tested before the trial and lower appellate courts of our judicial system. A delay in the Court's consideration of Petitioners' Petition for a Writ in the instant case, and in others now or soon pending, until the present backlog of cases before the

Court of Appeals for the Eighth Circuit is brought to this Court will do much to further the expeditious consideration of the important questions to be presented.

WHEREFORE, petitioners pray that the Court delay consideration of the Petition for a Writ of Certiorari to the Court of Appeals for the Seventh Circuit until the cases now before the Court of Appeals for the Eighth Circuit on this subject are ripe for review herein. At that time petitioners will ask that the cases be consolidated for consideration of the various Petitions for Certiorari heretofore and hereafter to be filed.

Respectfully submitted,

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Dated: February 15, 1974

APPENDIX A

SYNOPSIS OF CASES ARISING OUT OF I.C.C. DOCKET 34971 ORDER

Case Series (Name)	Lower Court & Docket #s	# of Complaints Involved	# of Plaintiffs still in	# of Defendants still in	Disposition by Trial Court & Cite	Court of Appeals & Docket #s	2/8/74 Status
Mueller Co. v. United Buckingham Freight Lines	Cir.Ct.,6th Jud. Distr. Macon County, Ill. 70-LM-264	1	1	8	--	--	Process Not Yet Served
Amana Refrigeration, Inc. v. Bruce Transfer (Consol.)	U.S.D.C. No.D.Iowa, Cedar Rapids Div. 70-C-13-CR 70-C-14-CR 71-C-19-CR 71-C-21-CR	4	3	23	Summary Judgments for PS. Costs, Fees (100% of award) 4% Interest from 10/12/71. [unreported]	8th Cir. 73-1507 73-1508 73-1509 73-1510 (Consol.)	Briefed in Circuit.
Liberty Glass Co. v. Arkansas Best Freight Systems, Inc.	U.S.D.C. No.D.Okla. 70-C-187 thru 191	5	1	5	Action To Be Dismissed with Prejudice	--	Settled.
Liberty Glass Co. v. Western Gillette Inc.	Dist.Ct. for Creek County, Okla. C-70-140 (Consol.)	14	1	14	Action to Be Dismissed with Prejudice	--	Settled.

American Crystal Sugar Co. v. Indianhead Truck Lines	U.S.D.C. D.Minn., 4th Div. 4-70 Civil 226	1	1	10	Summary Judgment for P., Costs, Fees, 6% interest from 6/5/69. 351 F.Supp.102 359 F.Supp.741	8th Cir. 73-1580	Motion to consol. granted. Partially Briefed in Circuit
Land O' Lakes v. United Buckingham Freight Lines, Inc.	U.S.D.C. D.Minn., 4th Div. 4-71 Civil 221 thru 238 & 240	19	1	19	Same	8th Cir. 73-1581	
Container Corp. v. Hart Motor Express, Inc.	U.S.D.C. D.Minn., 4th Div., 4-71 Civil 264	1	2	6	Same	8th Cir. 73-1682	Consolidation of these cases with all other related 8th Cir. cases for argument has been granted
United States v. Admiral-Merchants Motor Freight, Inc.	U.S.D.C. D. Minn., 4th Div. 4-71 Civil 189	1	1	27 (See note 1)	Summary Judgement for P., Costs and interest at 4% from 6/5/69. [unreported]	8th Cir. 73-1670	
United States v. Arkansas Best Freight System, Inc.	U.S.D.C. No.Dist. Tex.Ft.Worth Div. 4-1739	1	1	21	Summary Judgment on liability for P. [unreported] [no opinion]	--	To be tried on issue of damages. (Not yet set).

United States v. Burlington Truck Lines, Inc.	U.S.D.C. W. Dist. Mo.W.Div. 19339-4	1	1	12	Judgment for P.Costs & 4% interest from 5/4/71 356F.Supp.582	8th Cir. 73-1202	Consolidated in 8th Cir.
Western Electric Co. v. Burlington Truck Lines, Inc.	U.S.D.C. W.Dist.Mo. W.Div. 18471-4	1	1	10	Judgment for P. Costs, Fees, 6% interest from 6/25/70 [unreported]	8th Cir. 73-1200	Partially Briefed
Proctor & Gamble Co. v. Ideal Truck Lines	U.S.D.C. W.Dist.Mo. W.Div. 18829-4	1	2	3	Judgment for P. Costs, Fees, 6% interest from 8/12/70 355F.Supp.547	8th Cir. 73-1201	
Proctor & Gamble Co. v. Admiral Merchants Motor Freight, Inc.	U.S.D.C. No.Dist.Ill, No.Div. 71-C-258	1	3	32	--	--	Stayed. Stipulated on outcome of P.G.C. appeal (Now in 8th Cir.) At issue.
Proctor & Gamble Co. v. Burlington Truck Lines, Inc.	U.S.D.C. No.Dist.Ill, No.Div. 71-C-1012	1	3	2	--	--	Same.

Sweetheart Cup Corp. v. Advance United Express-ways, Inc.	U.S.D.C. No.Dist.Ill, No.Div. 71-C-1020 71-C-1021	2	2	48	--	--	Same.
Procter & Gamble Co. v. Western Trucking Co.	U.S.D.C. E.Dist.Mo. E.Div. 70-C-578(1)	3	1	1	--	--	Same.
Western Electric Co. v. Admiral Merchants Motor Freight, Inc.	U.S.D.C. No.Dist.Ill, E. Div. 70-C-1531	1	1	66	--	--	Inactive. Will probably follow outcome Kansas City West. Elec. case. (Now in 8th Cir.) At issue.
Container Corp. v. Admiral Merchants Motor Freight, Inc.	U.S.D.C. No.D.Ill. E.Div. 71-C 996	1	2	84	Judgment for Ds. [unreported]	7th Cir. 72-1646	Reversed. Petition for Certiorari in January, 1974.
Montgomery Ward & Co., Inc. v. Anderson Motor Services Inc.	U.S.D.C. No.Dist.Ill. E. Div. 71-C 2019	1	1	33	Transfer of venue from W.D.Mo. 339F.Supp.713	--	At issue. Inactive pending resolution of Container Corp. case immediately above.

Bemis Co., Inc. v. Burlington Truck Lines, Inc.	U.S.D.C. No.Dist.Ill. E.Div. 70-C-1580	1	5	17	Summary Judgment for P. [unreported] fees, but no costs or interest.	7th Cir. 73-1695	Appeal dismissed. Settled.
Bemis Co., Inc. v. Admiral Merchants Motor Freight, Inc.	U.S.D.C. D.Minn, 4th Div. 4-70-Civil 237	1	5	32	--	--	Settled.
Federal Cartridge Corp. v. Ward Transfer, Inc.	U.S.D.C. D.Minn. 4th Div. 4-71 Civil 247	1	1	1	--	--	Settled.
S.S. Kresge Co. v. A&B Transfer, Inc.	U.S.D.C. E.Dist. Mich. So.Div. 34887	1	1	Approx. 200 - (approx. 200 dismissed with prejudice)	Summary Judgment for P. No interest or fees.	6th Cir. 72-1967	Affirmed. Petition for Certiorari pending.
Allison Products Corp. v. C.H. Rapp & Sons	2d Dist.Ct. Michigan 4058-RK 4059-R	2	1	2	--	--	Set for trial 2/25/74.

American Seating Co. v. Roche Transfer Line	61st Jud. Dist.Ct., Michigan. 51684	1	1	5	--	--	A-6 Stipulated on outcome of Kresge appeal.
L.E.Trotter & Assoc. v. Associated Truck Lines, Inc.	U.S.D.C. W.Dist., Mich. So.Div. G254-71-CA (Consol)	19	1	19	--	--	Inactive. At issue.
Steel Case, Inc. v. Interstate Motor Freight System	61st Jud. Dist., Michigan 50609	1	1	6	--	--	Inactive. At issue.
Bergstrom Paper Co. v. C.W. Transport, Inc.	Dane County Cir.Court, Branch III, II, Mich. 131-053 131-054	2	1	3	--	--	Stayed pending resolution of Kresge appeal.
American Can Co. v. C.W. Transport, Inc.	U.S.D.C. W.Dist.Wisc. (Consol.) 70-C-166 thru 174	9	1	9	--	--	Settled.

Brockway Glass Co. v. Jones Truck Lines, Inc.	Muskogee County Dist. Ct.,Okla. (Consol.) C-71-267 thru 271	5	1	5	--	--	Trial cont'd. indefinitely
Aluminum Co. of America v. Admiral Merchants Motor Freight,Inc.	U.S.D.C. No.D.Ill., E.Div. (Consol.) 70-C-1189 thru 1200.	11	1	11	Summary Judgments for P.Costs, attorney fees 6% interest from 6/5/69. 337 F.Supp. 674 337 F.Supp. 683 342 F.Supp. 166	7th Cir. 72-1264 thru 1268 72-1505 thru 1512 (Consol.) (affirming trial court) __F.2d__ 1973 Fed. Carr.Cases ¶84,420 petition for reh. denied (unreported) Attorney fees allowed (unreported)	Petition for certiorari. Denied.
Minnesota Mining & Mfg. Co. v. Admiral Merchants Motor Freight, Inc.	U.S.D.C. Dist.Minn. 4th Div. 4-71 Civ 221	1	1	21	Summary Judgment on liability for P. 351 F.Supp. 102 359 F.Supp. 741	--	Trial on damages held 7/5/73. Pending resolution. Appeal virtually certain.

Bela Seating Co. v. Advance Transportation Co.	U.S.D.C. No.Dist.Ill. E.Div. 71-C-2455	1	10	20	Dismissed.	--	Settled.
Time, Inc. v. C.W. Transport Inc.	U.S.D.C. No.Dist.Ill. E.Div. 70-C-1952	1	1	3	Dismissed	Dismissed	Settled.
Levey Div., Cities Service Co. v. Abel Freight Lines, Inc.	U.S.D.C. No.D.Ill., E.Div. 71-C-1247	1	1	6	Dismissed	--	Settled.
Ceco Corp. v. Admiral-Merchants Motor Freight, Inc.	U.S.D.C. No.D.Ill., E.Div. 71-C-1217	1	1	38	Dismissed	--	Settled.
Ryerson & Son, Inc. v. Advance United Expressways, Inc.	U.S.D.C. No.Dist.Ill. E.Div. 71-C-1213	1	1	28	--	--	Consolidated.
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United Labora-tories, Inc. v. Elgin Storage & Transfer Co.	U.S.D.C. No.Dist.Ill. E.Div. 71-C-1476	1	1	4	Dismissed with prejudice.	--	Settled.
Zenith Radio Corp. v. Be-Mac Trans-port Co.	U.S.D.C. No.Dist.Ill. E.Div. 71-C-1282	1	1	3	Dismissed with prejudice.	--	Settled.
Jones & McKnight Steel, Inc. v. Chief Freight Lines, Inc.	U.S.D.C. No.Dist.Ill. E.Div. 71-C-1218	1	1	22	Dismissed with prejudice	--	--
Jones & McKnight Steel, Inc. v. Chief Freight Lines, Co.	U.S.D.C. Dist.Minn. 4th Div. 4-71-Civ.249	1	3	22	Dismissed with prejudice	--	--

F & B Mfg. Co. v. Be-Mac Transport Co., Inc.	U.S.D.C. No.Dist.Ill. E.Div. 71-C-1245	1	1	5	Dismissed with prejudice.	--	--
Kendall Co. v. All American Transport, Inc.	U.S.D.C. No.Dist.Ill. E.Div. 70-C-1202	1	1	6	--	--	Inactive. Probable settlement. At issue.
Meredith Corp. v. All American Transport, Inc.	U.S.D.C. Nc.Dist. Iowa Central Div. 11-362-C-2	1	1	14	--	--	Same.
Lennox Industries, Inc. v. Western Transp. Co.	Dist.Ct. for Marshall Iowa 31446 thru 31451 & 31683	7	1	7	--	--	Inactive. At issue.
Lennox Industries, Inc. v. Bruce Motor Freight, Inc.	Dist.Ct.for Polk County, Iowa Law Nos. 1173 thru 1175	3	1	3	--	--	Inactive. At issue.
American Home Products Corp. v. A&B Transfer Co., Inc.	U.S.D.C. No.Dist.Ill. E.Div. 70-C-1562	1	8	129	Motion for Summary Judgment denied. [unreported]	--	Consolidated before same judge. (w/case below)

Abbott Laboratories v. Advance United Expressways, Inc.	U.S.D.C. No.Dist.Ill. E.Div. 71-C-1236	1	39	110	Same	--	Motion to reconsider, etc.pending
Appleton Electric Co. v. Advance-United Expressways, Inc.	U.S.D.C. No.D.Ill. E.Div. 70-C 1427	1	1 Plus approx 200,000 class members	17 Plus approx 1400 class members	Classes defined [unreported] Summary Judgment on liability for Ps [unreported] Order notices to Ds [unreported] Order Discovery of Ps names & addresses [unreported]	7th Cir. 73-1323 (Appeal dismissed without prejudice) [unreported] 72-1201 (petition for Prohibition denied) (unreported) Trial Court affd. 1/16/74	Active in Trial Court. Motion to add numerous Ps & Ds undecided. Motions pending. Interlocutory Appeal. Petition for certiorari being prepared.

NOTES TO SYNOPSIS

1. Barber Transportation, Inc., an included defendant, on its own behalf only, has filed a motion for rehearing in the District Court. The motion is submitted on affidavits and has been argued. Barber has not yet filed notice of appeal, therefore. Rehearing to be held March 22, 1974.

SUPREME COURT, U. S.
FILED
FEB 19 1974
MICHAEL RODAK, JR., CLERK

IN THE

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OCTOBER TERM, 1973

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vs.

CONTAINER CORPORATION OF AMERICA
and
MONTGOMERY WARD & CO., INCORPORATED,

Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Seventh Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1125

ADMIRAL-MERCHANTS MOTOR FREIGHT, INC., et al.,

Petitioners,

vs.

CONTAINER CORPORATION OF AMERICA
and
MONTGOMERY WARD & CO., INCORPORATED,

Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW.

The opinion of the Court of Appeals is not yet officially reported. It is set forth at pp. D2-D8 of the appendix to the Petition for Certiorari ("Pet.") herein. The opinion of the District Court is unreported and is set forth at page D-1 of the Petition.[1]

JURISDICTION.

The jurisdictional requisites are appropriately set forth in the Petition.

QUESTIONS PRESENTED.

The questions presented are:

(1) Whether the Court of Appeals correctly held that an action to enforce an order of the Interstate Commerce Commission brought within one year of the date on which litigation prosecuted by the petitioners to obtain judicial review of that order was completed, was not barred by the one-year limitation provision of § 16(3)(f) of the Interstate Commerce Act.

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[1] The order of the Interstate Commerce Commission which Respondents here sought to enforce, was upheld in *Admiral-Merchants Motor Freight, Inc.* v. *United States*, 404 U.S. 802 (1971), rehearing denied 404 U.S. 987, *Aluminum Company of America* v. *Admiral-Merchants Motor Freight, Inc.*, 486 F.2d 717 (C.A. 7) (1973), certiorari denied, December 17, 1973, *S. S. Kresge Co.* v. *A. & B. Transfer, Inc.*, ... F.2d ...., (C.A. 7) (1973), Petition for Certiorari pending, *Container Corporation of America and Montgomery Ward & Co., Incorporated* v. *Hart Motor Express, Inc.*, U.S.D.C., Dist. Minn., 4th Div., 4-71 Cir. 264 et. seq., November 20, 1972, appeal pending, (C.A. 8).

(2) Whether a class action filed within one year of an order of the Interstate Commerce Commission suspends the statute of limitations for all asserted members of the class, including those who, as the respondents herein, subsequently decide to prosecute their individual actions.

STATUTORY PROVISIONS INVOLVED.

This case involves the Interstate Commerce Act, 49 U.S.C. § 16(2) and (3)(f). Pertinent provisions of that Act are set forth in the Petition, pp. 2-3.

STATEMENT OF THE CASE.

There are facts in the case in addition to those set forth in the Petition for Certiorari which should be brought to the Court's attention.

(a) On January 26, 1970, the carriers sought judicial review of the order of the Interstate Commerce Commission by filing a complaint in the United States District Court for the District of Colorado, seeking a declaration that the order was invalid, and asking for an injunction against enforcement of the refund obligation.

On June 19, 1970, in a Motion For Temporary Restraining Order filed with the District Court in Colorado, the carriers represented that the shippers would incur substantial cost in presenting their claims and therefore, suffer irreparable injury if the I.C.C. order were not enjoined. Thus, the carriers argued:

"12. That in addition to the above costs to the carriers, the shippers would also incur substantial costs in presenting their claims."

"15. And that, unless this Honorable Court restrains the effectiveness, operation and enforcement of said Order, these Plaintiffs, as well as numerous members of the shipping public, will be immediately, substantially and irreparably injured and damaged." (R. A. 4)[2]

(b) On July 6, 1970, the Interstate Commerce Commission sought clarification of the Temporary Restraining Order as it related to the filing of suits and filed the "Motion of the United States of America and the Interstate Commerce Commission for Clarification of Temporary Restraining Order." (R. A. 7-8)

On July 10, 1970, the carriers filed Suggestions opposing that motion and stated:

"The Decision and Order which is restrained is pending judicial review, in limbo. It is ineffective for any purpose. A moment's thought will surely lead to the conclusion that what the government's motion really seeks is a partial effectiveness of the restrained Decision and Order." (R. A. 13)

(c) The filing of a class action on June 15, 1970 on behalf of all shippers who paid overcharges against a class of defendant carriers who were directed to refund such overcharges. *Appleton Electric Company et al.* v. *Advance-United Expressways, et al.*, No. 73-1665, District Court for the Northern District of Illinois, aff'd. January 16, 1974 (C.A. 7), 73-1665.

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[2] References to the appendix to this brief are designated "R.A.".

ARGUMENT.

The decision of the Court below was plainly correct. There is no conflict of decision. In any event, the ruling of this Court in *American Pipe and Construction Co., et al. Petitioners* v. *State of Utah, et al.*, 42 LW 4155, clearly requires a holding that the statute of limitations was tolled as to all asserted members of the class of shippers and carrriers on June 15, 1970, when the action was filed in *Appleton Electric Company et al.* v. *Advance-United Expressways, et al., supra* p. 5.

I.

The decision below is manifestly correct.

The principal argument of the petitioners is that the "statutory limitation provided in Sec. 16(3)(f) is substantive in nature and not a procedural statute of limitations, containing as it does, the words "and not after" (Pet. 9). Accordingly, they argue, the Courts cannot extend the one-year period beyond that provided by the law.

This argument was expressly rejected by this Court in the *American Pipe* case, *supra,* when it held that the one year period of limitations of § 5(b) of The Clayton Act, 15 USC § 16(b), did not bar an action brought after the passage of one year.

In that case, a class action was filed by the State of Utah alleging a Sherman Act conspiracy in the sale of concrete and steel pipe. The suit was filed on May 13,

1969, eleven days prior to the termination of the one year limitations period following the conclusion on May 24, 1968, of civil actions brought by the Government, and was found to be timely under Section 5(b) of the Clayton Act. On December 4, 1969, the District Court entered an order that the action could not be maintained as a class action and that the class action was terminated as of May 13, 1969, the date it was filed. Various members of the class then sought to intervene in the Utah case on December 12, 1969, more than one year after the Government's case was concluded. The District Court denied intervention and held that the period of limitations in Section 5(b) of the Clayton Act barred the suit.

The Court of Appeals reversed and this Court affirmed, holding that the class action filed eleven days prior to the termination of the limitation period suspended the operation of the statute until the day the order denying the class was entered. It then ruled that the motion to intervene on December 12, 1969, eight days after the entry of the order denying class action status, was therefore timely.

There, as here, the contention was made that the federal courts are powerless to extend the limitation period beyond that set by Congress because it is a substantive element of a plaintiff's right to sue and therefore immune from change.

This Court rejected that argument in the *American Pipe* case, *supra,* p. 5 when it declared:

> "The proper test is not whether a time limitation is 'substantive' or 'procedural', but whether tolling the limitation in a given context is consonant with the legislative scheme."

The Court went on to say that,

> ". . . the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose."

The Court of Appeals below clearly anticipated this reasoning of the Court when, after tracing the series of delays obtained by the carriers against enforcement of the I. C. C. Order, it declared:

> "In this case, the judicial proceedings did not result in any material change in the Commission's order. However, it was possible that the carriers might persuade the reviewing court to set aside, annul, or sustain, in whole or in part, the order of the Commission. Had the order been changed, an aggrieved party might not ever have been able to prepare or file a proper action until after the court's decision became final. It would be anomalous to hold that a Commission order is final before judicial review is completed if, but only if, review leaves the Commission's order undisturbed."

The Court stated further:

> "No statutory policy will be served by requiring shippers to incur the expense and inconvenience of filing protective suits prior to the termination of the judicial proceedings initiated by the carriers to review the legality of the Commission's order. This conclusion is buttressed by the basic policy to ensure uniformity in treatment of shippers. See *Midstate Horticultural Co.* v. *Pennsylvania Railroad Co.*, 320 U.S. 356, 361. This policy would not be served by allowing recovery to shippers who were prudent enough to file claims during the period of uncertainty, and denying

> recovery to those who justifiably awaited the final determination of the order's validity and enforceability."

In light of the carriers' repeated contentions that the limitations period could not be extended by review of the Commission order to the Supreme Court, the representations they made to the Court in the Denver proceeding cannot be ignored. There, the carriers sought and obtained rulings in that Court which suspended and enjoined the operation of the refund order. They cannot, therefore, argue that the statute of limitations bars the Respondents' suit here where they represented to the Denver Court that unless the order was suspended for all purposes that the shippers would be irreparably damaged, *supra* pp. 4-5.

This Court met this issue head-on in *Glus* v. *Brooklyn Eastern District Terminal,* 359 U.S. 231 (1959), cited also in the *American Pipe* case, *supra* p. 6. In that case, the plaintiff claimed he was induced to delay his action under a Federal Employers Liability Act three-year limitations period because the defendant represented that he had seven years to sue. The Court declared,

> "To decide the case, we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence, this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations."

II.

A class action filed within one year of an order of the Interstate Commerce Commission suspends the statute of limitations for all asserted members of the class including those who subsequently decide to prosecute their individual actions.

The carriers assert that the Seventh Circuit rejected the Respondents' class action argument. (Pet. 9) They misrepresent the opinion of Judge Stevens since he only referred to this contention in the decision stating that it had been raised by counsel for the plaintiffs as a third alternative argument (Pet. D-6 fn. 9). No ruling was made on the argument. Although the Court did not meet this issue, Respondent here urges this argument raised initially in its Supplemental Brief to the Court of Appeals and in oral argument in support of the judgment below.

In *Appleton Electric, supra* p. 5 a class action was filed on June 15, 1970 on behalf of all shippers who had paid overcharges against a class of all carriers covered by the order here in issue, seeking refunds of overcharges. The District Court issued an order allowing the case to proceed as a class action. The issue of class maintainability went to the Seventh Circuit on an interlocutory appeal and the District Court's decision was affirmed.

Since the Respondents were clearly members of the class of plaintiffs in *Appleton Electric* at the time that case was filed, and all the Petitioners were carriers covered by that Commission order and therefore members of the class of defendants, the statute of limitations was tolled on June 15, 1970, when the complaint was filed in *Appleton Electric.*

The Court's attention is again invited to its decision in *American Pipe, supra* p. 5, where it held that the commencement of a class action suspends the applicable statute of limitations as to all members of the class who would have been parties had the action been permitted to continue as a class. The Respondents' action was commenced on April 27, 1971, at a time during which the statute of limitations of 16(3)(f) was tolled.

III.

The one-year period of Section 16(3)(f) runs from the day the carriers are in default of an I.C.C. order.

Another argument raised before the Court of Appeals by Respondent but on which no direct ruling was made, is urged here again in support of that Court's judgment.

The one-year limitation period described in 16(3)(f) did not begin to run in this case from the date the I.C.C. issued its order for the payment of money. Instead, it runs from the day fixed by the I.C.C. for the carriers to pay the shippers' claims which here was the day the Respondents presented their claims for refund to the carriers supported by paid freight bills or other appropriate evidence.

Sections 16(2) and (3)(f) of the Interstate Commerce Act, when read together, have been held to mean that the one-year period of 16(3)(f) runs from the compliance date fixed by 16(2). Since in this case, the Commission did not set a calendar date for compliance with its order, suits for enforcement of the order may be brought within one year of the date on which the carriers became obligated to make a payment, and this was when the shippers pre-

sented their claims supported by paid freight bills. The respondents filed their claims with the carriers in early 1971, well within the one-year period next preceding the filing date of the complaint, April 27, 1971.

This construction of Section 16 has been consistently followed by the courts for over fifty years and was recently affirmed in *Missouri Pacific Railroad Company* v. *Austin*, 292 F.2d 415, (C.A. 5) (1961). In that case, the I.C.C. issued an order on July 25, 1955 which directed the carrier to pay Western Wood Products Company "on or before September 27, 1955, the sum of $2,659.92 as reparation." The suit to enforce the award was filed on September 27, 1956, within one year of the date required for payment, but more than a year from the "date of the order (July 25, 1955)." There, as here, the carriers contended that the action was barred by the one-year limitation of Section 16(3)(f), but the Court rejected the argument stating:

> "We are clear that the suit to enforce the award was timely filed. It is a literalism in its most artificial extremity to regard—as the Railroad contends—only the literal words of § 16(3)(f) that fixes the period of suit as 'within one year from the date of the order, and not after.' * * *. That approach on statutory construction is, at best, far from decisive. "It is perfectly plain that Congress intended to do three things. First, the Commission was to prescribe a time by which the reparation order was to be paid by the carrier. Second, the carrier was not required to pay prior to that time. And third, the person obtaining the award was to have a year in which to secure enforcement through judicial means if the carrier did not voluntarily comply. These policies would be frustrated were the time for suit measured by the initial date. The actual time available for filing suit would

be something less than a year depending on the interval between the date of issuance of the order and the prescribed date of payment. More than that, this would run counter to all notions of limitations which treats the beginning point as the time the judicially enforceable cause of action accrues. Concededly, suit could not have been filed prior to September 27, 1955. 16(2). No right of judicial action having come into being prior to that time, the one-year period commenced on that date. That is the 'date of the order'." (pp. 418-419)

The construction of Section 16(3)(f) as expressed in *Missouri Pacific* was earlier announced in *Standard Oil Co.* v. *Davis,* 6 F.2d 236 (1925) (D.C.N.D. Cal.). In that case, the court carefully traced the history of early I.C.C. procedure of specifying the number of days within which its orders should be obeyed, the practice of naming a time "on or before" which payment should be made, and how this language was eventually incorporated into Section 16(1). The Court declared at p. 237 of that case:

"Clearly, under the act here, the *plaintiff could not have brought its suit until after the 'effective date' of the order.* Moreover, it might readily happen that for one reason or other the *Commission would postpone the payment until a year after its order.* It is thus seen that the construction contended for by Plaintiff is more reasonable and at the same time in consonance with settled principles relating to statutes of limitations. (emphasis added).

"But it cannot be said that 'the date of the order' under a strict construction, necessarily means the date of its promulgation. The language is equally susceptible of the meaning 'date fixed by the order.' That this is the reasonable and time-honored interpretation is made clear by the language of the Supreme

Court in *Mutual Life Insurance Co.* v. *Hurni Packing Co.*, 263 U.S. 167, 44 S. Ct. 90, 86 L. Ed. 235, 31 A.L.R. 102, where it is said:

"The word 'date' is used frequently to designate the actual time when an event takes place, but, as applied to written instruments, its primary signification is the time specified therein. Indeed, this is the meaning which its derivation (datus—given) most naturally suggests. In *Bement & Dougherty* v. *Trenton Locomotive, etc., Co.*, 32 N.J.L. 513, 515, 516, it is said: "The primary signification of the word 'date' is not time in the abstract, nor time taken absolutely, but as its derivation plainly indicates, time given or specified, time in some way ascertained and fixed; this is the sense in which the word is commonly used. • • •"

Again, in *Chesapeake and O. Ry. Co.* v. *Walton*, 99 F. 2d 270 (1938), the Fourth Circuit Court of Appeals rejected the carrier's contention that the one-year limitation period began running from the date the I.C.C. issued its order. Suit was filed in that case on December 10, 1937 to enforce an order of October 5, 1936, which order directed payments on or before December 15, 1936. On p. 272 of that case, the Court said:

"On the other hand, the second date (December 15, 1936) has particular significance since it is the point of time at which the duty of the carrier to pay and the right of the shipper to sue both arise."

The decisions in *Missouri Pacific* and in the earlier cases reflect a sensible interpretation of the statute. The courts have seen that a literal reading of the statute would lead to illogical, absurd results and have rejected arguments founded on such analyses. If for example, a Commission order did not require payment within a year of its date, a shipper would have no

opportunity to file its suit and its cause of action would be barred before it had accrued. A similar reading of the statute in this case would require such a nonsensical result if the one-year period is held to have begun on the date of the order. The Appellants' cause of action arose over a year subsequent and the limitation period begins to run from that later date.

Authoritative guidance for the determination of the time a plaintiff's cause of action arises is found in *I.C.C.* v. *Atlantic Coast Line R. Co.*, 383 U.S. 576 (1966). There, this Court in adopting the *Missouri Pacific* rationale, said at p. 596:

> ". . . the shipper's § 16 (2) suit must await passage of the date set for compliance."

This is the critical time that gives life to a plaintiff's suit for recovery of moneys due. It is the date its judicially enforceable cause of action accrues and fixes the start of the period of limitation.

In the instant case, the I.C.C. refund order did not specify a calendar date for compliance for the carriers but instead, set a compliance time so as to be ascertainable by the parties. The Commission in its order of August 29, 1969, required:

> ". . . that the respondents will hereafter, in accordance with the said decision of June 5, 1969, make refund to shippers presenting their claims to the carriers supported by paid freight bills or other appropriate evidence."

No obligation on the carriers to pay refunds could arise until properly supported claims were presented to them, and this requirement imposed on the shippers a condition precedent to the creation of their cause of action.

CONCLUSION.

The decision of the Court of Appeals, that the one year period of limitation does not begin to run until litigation instituted by the affected carriers to set aside, annul or amend the I.C.C. order had been concluded, is manifestly correct and consistent with the decisions of this Court in the *American Pipe* and *Glus* v. *Brooklyn Eastern District Terminal* cases.

Moreover, it is clear that the filing of the class action in *Appleton Electric* effectively tolled the statute of limitations for all of the affected shippers and carriers, including the Respondents. Finally, under the decision of this Court in *I.C.C.* v. *Atlantic Coast Line R. Co.* the one year period of limitation would not, in any event, begin to run until the shippers presented their claims to the carriers.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

ADMIRAL-MERCHANTS MOTOR FREIGHT, INC., ET AL.,

Plaintiffs,

vs.

Civil Action No. C-2030

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants.

MOTION FOR TEMPORARY RESTRAINING ORDER

(Filed June 19, 1970)

Come Now the Plaintiffs, by and through their attorneys, pursuant to the provisions of 23 U.S.C., Section 1336(a), 28 U.S.C., Section 2324, 28 U.S.C., Section 2284(3), and 5 U.SC.., Section 702, and respectfully move this Honorable Court for an Order temporarily restraining the effectiveness, operation and enforcement of the Order of the Interstate Commerce Commission entered in Docket No. 34971, *Increased Rates and Charges, From, To, and Between Middlewest Territory,* 335 I.C.C. 397, as modified by that Commission's Order of August 29, 1969, upon reconsideration, which Order became effective September 29, 1969, in so far as said Order requires or permits the payment of refunds by Plaintiffs.

In support thereof, Plaintiffs would respectfully state and show this Honorable Court as follows:

(Appendix)

1. The complained of Order directs the Plaintiffs to refund, to shippers presenting their claims to the carriers supported by paid freight bills or other appropriate evidence, a portion of the tariff charges collected by the Plaintiffs between April 1, 1968, and September 1, 1969, as is set forth in the Complaint in this Action.

2. An Application is on file with this Honorable Court seeking an interlocutory injunction restraining the enforcement, operation and execution of the refund portion of the subject Order of the Commission.

3. Some shippers, pursuant to the aforesaid Order have filed claims with some of the Plaintiffs demanding refunds.

4. Additionally, several shippers have instituted lawsuits for the enforcement of the Commission's Order in various jurisdictions throughout the country against certain of the Plaintiffs.

5. That the Plaintiffs have not paid the claims pending the appeal and review of the Order of the Commission in this Court.

6. That it is possible that, unless the Order referred to above is stayed and its operation suspended, the Plaintiffs may be subjected to criminal sanctions for their refusal to comply with the Commission's Order.

7. That the multiplicity of lawsuits being brought by the shippers to collect the refunds provided by the Order may result in divergent and conflicting decisions in the various jurisdictions, whereas a final decision by this Court on the merits would be res judicata as to the Plaintiffs involved and would undoubtedly control the action of the unnamed members of the Middlewest Motor Freight Bureau (which included all of the carriers subjected to the refund Order).

(Appendix)

8. That the necessity for defending the multiplicity of lawsuits which is developing would be reduced if the Commission's Order were stayed and suspended, temporarily.

9. That, therefore, the expenses of litigating the question of the validity of the Commission's Order could be substantially reduced by the litigation of that question in a single forum—to-wit, before this Court, for the shippers, the Government and the Plaintiffs.

10. That, unless the Commission's Order is temporarily restrained, the Plaintiffs will be compelled to pay the claims of the shippers.

11. That the accounting and bookkeeping costs to the carriers alone involved in the payment of these claims would exceed the value of the claims.

12. That in addition to the above costs to the carriers, the shippers would also incur substantial costs in presenting their claims.

13. And that, if this Honorable Court ultimately grants relief to the Plaintiffs on the merits of the dispute and enjoins or restrains the enforcement, operation or execution of the subject Order, then the Plaintiffs would be caused the additional expense, under penalty of law for failure to do so, of recollecting the monies paid to the shippers upon their claims.

14. Further, that the subject Order of the Interstate Commerce Commission is unlawful and void.

15. And that, unless this Honorable Court restrains the effectiveness, operation and enforcement of said Order, these Plaintiffs, as well as numerous members of the shipping public, will be immediately, substantially and irreparably injured and damaged.

(Appendix)

16. Entry of the Temporary Restraining Order will also preserve the right of these Plaintiffs to judicial review of the Order of the Interstate Commerce Commission prior to its enforcement against them.

In support of this Motion the Plaintiffs submit herewith affidavits of responsible officials showing the injury and damage which will be incurred by them and their companies should the Temporary Restraining Order not be entered.

Respectfully submitted this 19th day of June, 1970.

/s/ Alvin J. Meiklejohn, Jr.
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(Appendix)

CERTIFICATE OF SERVICE

I, Arthur R. Hauver, one of the attorneys for the Plaintiffs, hereby certify that on this 19th day of June, A.D. 1970, I served a true copy of the foregoing pleading upon the Defendants by mailing the same, first-class or air mail postage prepaid, properly addressed, to their respective representatives of record.

/s/ Arthur R. Hauver

(Appendix)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

ADMIRAL-MERCHANTS MOTOR FREIGHT, INC., ET AL.,

Plaintiffs,

vs.

Civil Action
No. C-2030

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Defendants.

MOTION OF THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION FOR CLARIFICATION OF TEMPORARY RESTRAINING ORDER

(Filed July 6, 1970)

The United States of America and the Interstate Commerce Commission respectfully move that the Temporary Restraining Order filed herein on June 19, 1970, be clarified in the respects hereafter specified. This Motion is based upon the affidavits filed herein by the plaintiffs and upon the legal authorities cited in the memorandum of the defendants heretofore filed in support of their motion to dismiss.

Paragraph 1 of said Order restrained the operation of the Interstate Commerce Commission's Order "insofar as that Order requires or permits the payment of refunds." Paragraph 2 of said Order restrains all actions and attempts to enforce the Commission order.

However, we have pointed out heretofore that each shipper has rights of restitution, derived from general principles of equity, which would exist even if the Interstate Commerce Commission had never issued a repayment order. This is explained, with supporting citations, at pages 4 through 8 of our memorandum in support of our motion to dismiss.

Our questions are:

A. Does the Temporary Restraining Order forbid shippers, including the United States as a shipper, from bringing an action for restitution based upon general equitable principles and the findings of the Commission on the merits, and not based on an effort to enforce the Commission's repayment order?

B. Does the Temporary Restraining Order forbid any shipper from proceeding with an action for restitution already begun?

The movants herein respectfully suggest that both questions should be answered in the negative. The instant complaint is confined to an attack upon the repayment order issued by the Commission. It does not question the findings of the Commission on the merits of the rate increase. Shippers in at least three actions of which we are aware have filed suit at common law relying on the findings of the Commission and an equitable claim to restitution. To whatever extent they seek, or are entitled to, restitution, they do not seek to enforce a Commission order requiring or permitting a refund. Consequently, we find it hard to believe that this Court intended to enjoin actions *not* based upon enforcing the Commission order complained of herein.

We would further suggest that there can hardly be jurisdiction in this action over shippers other than the United

States seeking to enforce common law rights. The second affidavit by Andrew N. Happer herein shows that many shippers have filed suits in courts outside the District of Colorado. Those plaintiffs are not parties to the present action. Some of them are probably not amenable to service in this District. None, so far as we know, have been served with the Temporary Restraining Order. Moreover, the United States is the only shipper which is a party hereto. We submit that it would be a gross injustice to enjoin one shipper from seeking restitution while hundreds of other shippers are not so enjoined.

Therefore, the movants respectfully pray that the Court supplement its Temporary Restraining Order by making clear that it is to be read according to its literal terms and that it enjoins actions to enforce the Commission's repayment order but not actions for restitution based on Commission findings and general principles of equity.

Respectfully submitted,

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(Appendix)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

ADMIRAL-MERCHANTS MOTOR FREIGHT, INC., ET AL.,

Plaintiffs,

vs.

Civil Action
No. C-2030

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants.

SUGGESTIONS OF PLAINTIFFS IN OPPOSITION TO MOTION OF THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION FOR CLARIFICATION OF TEMPORARY RESTRAINING ORDER

Come Now Plaintiffs and respectfully file their Reply to the Motion of the United States of America and the Interstate Commerce Commission for Clarification of Temporary Restraining Order.

I.

In its Motion (more in the nature of a brief) the Government asks two hypothetical questions. The Plaintiffs would suggest to this Honorable Court that ruling in advance on abstract propositions is of doubtful wisdom. It can of course also be argued that the Court actually lacks jurisdiction to consider such abstractions but must wait until there is an actual case or controversy before it.

(Appendix)

II.

The language of the Temporary Restraining Order is plain and unambiguous. In partial support of the instant Motion the Government incorporates its argument submitted in connection with its "Motion of the United States of America and the Interstate Commerce Commission to Dismiss the Action". The Plaintiffs will not here attempt to answer the incorporated argument; rather, Plaintiffs will include in their main briefs in the instant action all such argument. Inclusion of this argument in the main briefs will be in compliance with the instructions of this Honorable Court at the time of the Pre-Trial Conference. Actually, the arguments surrounding the Government's Motion to Dismiss go directly to the matters involved in the review of the Commission's Order.

The Restraining Order, entered pursuant to appropriate provisions of the Judicial Code and the Administrative Procedure Act, stays the operation of the Order pending judicial review. This, as recited by the Restraining Order, is to preserve the right of the Plaintiffs to review, to preserve the appeal, to preserve the status quo, and to prevent irreparable injury and damage.

III.

As this Honorable Court would doubtless know, some of the assertions made in the Government's Motion are contested by the Plaintiffs. For example, the Government states that we do not contest the findings of the Commission. So that this matter may be set irrevocably to rest, the Plaintiffs hotly contest the findings of the Commission in so far as they support or are in any way related to the refund order. So far as the general increase for future effect is concerned, this Honorable Court should recall from

the pleadings that the 3-percent and 5-percent increase (depending on size of shipment) was ordered canceled one day and the Commission permitted these Plaintiffs and others similarly situated to put into effect a 6-percent increase on all shipments the following day. There was, therefore, little cause to contest the Order of the Commission requiring the cancellation of the 3-percent and 5-percent increase due to the fact that the carriers got a larger increase the following day.

Additionally, the Government, by inference, argues that there are lawsuits pending against the motor carriers which do not rely on the Commission's refund order. Every lawsuit that we have seen relies to one extent or another on the Commission's refund decision and order. Attached to the Government's Motion of the United States of America and the Interstate Commerce Commission to Dismiss the Action" are three Complaints, filed in various United States District Courts. It will be observed that each of these Complaints relies upon the assailed Decision and Order of the Interstate Commerce Commission, to one extent or another. Attachment No. 3 to that Motion, being the lawsuit instituted by S.S. Kresge Company, is 100 percent to enforce the Commission's refund order. Attachments Nos. 1 and 2 rely to an extent on the refund order, although they have a different theory of action expressed in the Complaints.

Numerically, the majority of the lawsuits filed against the motor carriers as a result of the Commission's Order here under review simply seek enforcement of the Commission's Decision and Order. There are a small number which are based on other theories, but even these rely upon the Decision and Order to one extent or another. In

most instances, as we advised this Honorable Court at the time of the Pre-Trial, the Plaintiffs had voluntarily agreed to stay their actions pending judicial review of the Commission Decision and Order. In some instances they had not. Following the entry of the Temporary Restraining Order other lawsuits have been stayed pending judicial review. There are now something like four or five lawsuits that have not been stayed pending conclusion of judicial review, and in those cases counsel is initiating procedures to attempt to get those proceedings stayed.

IV.

In reality, it appears to Plaintiffs that the Government urges the Court to enter some type of ruling or order which would have the effect of vacating, in part, the Temporary Restraining Order. The supposed common law restitution cases which have been filed against Plaintiffs all rest in large part on the Decision and Order of the Commission which is under review. The Decision and Order which is restrained is, pending judicial review, in limbo. It is ineffective for any purpose. A moment's thought will surely lead to the conclusion that what the Government's Motion really seeks is a partial effectiveness of the restrained Decision and Order.

The briefing schedule has been established. Hearing on the merits of the review and the preliminary motions has been set for October 5. Surely this short period of time to hearing by the statutory Three-Judge Court will not impair anyone, especially the United States Government.

Wherefore, premises considered, Plaintiffs pray the Honorable United States District Court for the District of Colorado to decline to answer the Government's abstract questions, and the Plaintiffs further pray that this Honor-

able Court decline to partially vacate the Temporary Restraining Order, by ruling or otherwise.

Respectfully submitted this 10th day of July, 1970.

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Dated: July 10, 1970

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In the Supreme Court of the United States

October Term, 1973

No. 73-1125

ADMIRAL-MERCHANTS MOTOR FREIGHT, INC., et al.,

Petitioners,

vs.

CONTAINER CORPORATION OF AMERICA and MONTGOMERY WARD & CO., INCORPORATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONERS IN REPLY

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March, 1974

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In the
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No. 73-1125

ADMIRAL-MERCHANTS MOTOR FREIGHT, INC., et al.,

Petitioners,

vs.

CONTAINER CORPORATION OF AMERICA and MONTGOMERY WARD & CO., INCORPORATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONERS IN REPLY

The Petitioners, motor carriers, herein renew their prayer that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the proceedings below on December 11, 1973.

INTRODUCTION

This petition presents a narrow but exceedingly important question concerning the proper interpretation of 49

U.S.C. §16(3)(f). The issue has arisen in a multitude of pending cases[1] arising out of an Interstate Commerce Commission rate-making order purporting to require motor carriers to pay refunds to shippers. The applicability of §16(3)(f) requiring suit "within one year from the date of the order" of the Commission in order to prevent extinguishment of the shippers' right to sue, depends entirely upon the issue of whether a shipper may sue a motor carrier under §16 of Part I of the Interstate Commerce Act. That issue has been presented in a directly related petition for certiorari presently pending. *A & B Transfer, Inc. v. S. S. Kresge Co.*, No. 73-1056 (petition for certiorari filed January 7, 1974). The question presented here is viable only in the event that the Seventh Circuit's prior decision in *Admiral-Merchants Motor Freight, Inc. v. Aluminum Company of America,* 486 F.2d 717 (7th Cir., 1973), U.S.S.C. No. 73-669, *cert den.* December 17, 1973 (in which it ruled that §305(g) of Part II of the Act incorporated §16(2) of Part I, creating a cause of action against motor carriers) was an accurate resolution of that issue. If the Seventh Circuit was wrong in that determination, then this petition should be granted and the Court below *summarily* reversed.

Respondents have confined their argument to the merits of the issue presented, rather than addressing themselves more fully to the issue of why the writ should or should not be granted. Indeed, displaying a significant lack of faith in the Circuit's ruling, Respondents suggest alternative solutions to the Circuit decision, which solutions conflict with the resolution by the Court below. Those very alternatives proposed by Respondents emphasize the necessity for the granting of certiorari herein, because the cases underlying those theories define another split between the circuits, and because acceptance of either of the alternative solutions would result in the granting of greater or different rights to some shippers in respect of the rates in issue than other shippers have been accorded, with resultant lack of uniformity between shippers.

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[1] See Petition for Cert., Appx. A.

Fortunately, the alternatives proposed by Respondents have been rejected by all courts to date in *this* series of cases. (That is, the series of cases reflected in Appendix A to the Petition).

It is also worthy of note that the Respondents' alternative issues and arguments do not flow from the decision upon which the Petitioners seek review, but consist of arguments rejected by the Circuit in rendering its decision upon the grounds that it did – namely, that § 16(3)(f) did not require suit until one year after judicial review had been concluded. The Respondents have not cross-petitioned, nor sought review on those issues.

The granting or denial of certiorari is not normally considered a ruling on the merits of the questions presented, but rather, a ruling upon the importance of the questions presented and on the considerations governing review on certiorari set forth in Rule 19. *Cf., United States v. Carver,* 260 U.S. 482, 490 (1923). By this petition and the related petitions[2] the Court has been requested to review issues of substantial importance concerning the proper application of the Interstate Commerce Act to motor carriers and their shippers.

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[2]See petition for certiorari in No. 73-1056, *A & B Transfer, Inc. v. S. S. Kresge Co.* A petition is being prepared and will be submitted within the next few days in *Appleton Electric Co. v. Advance-United Expresswaays,* ____ F.2d ____ (7th Cir. No. 73-1665, decided January 16, 1974.) Other cases, arising out of the same I.C.C. order, are on appeal and have been consolidated before the Eighth Circuit, and were orally argued on February 11, 1974. Those twelve cases are consolidated under the lead case entitled *Western Electric Co. v. Burlington Truck Lines, Inc.* (8th Cir. No. 73-1200). Motions to defer consideration of pending petitions for writ of certiorari until the Eighth Circuit decision can be consolidated with those of the Sixth and Seventh Circuits presently pending have been filed in No. 73-1056 and in the instant case, No. 73-1125. It is anticipated that a similar motion to defer will be filed in *Appleton, supra,* so that these cases, which all arise out of the same I.C.C. order, may be jointly considered with the determination of the Eighth Circuit when rendered.

One of the difficulties in these related proceedings to date has resided in the piecemeal nature of the various shippers' actions. Piecemeal consideration of various aspects of the problems created by the Commission's novel order has, for example, resulted in holdings in the district courts in the Eighth Circuit[3] that the substantive statute of limitations expired about March 15, 1972, whereas the Seventh Circuit found the expiration date to be December 27, 1972. The pending class litigation (referenced at n. 2, *supra*) opens new vistas for conflicts with respect to other carriers and shippers and the selected date applicable thereto.[4] All under the same I.C.C. order,[5] *Increased Rates and Charges From, To and Between Middlewest Territory*, 335 I.C.C. 142 (June 5, 1969).

The deviant rules and results which have prevailed in the courts below should be reviewed by this Court concurrently so that the Court may have before it the entire spectrum of

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[3] *E.g., Procter & Gamble v. Byers Transp. Co.*, 335 F. Supp. 547 (W.D. Mo., 1973), appeal pending, 8th Cir. No. 73-1201, argued 2/11/74.

[4] Many of the unnamed defendants have opted out of the defendant class in that Rule 23(b)(3) action. Currently, although the plaintiff class members have not been notified of the existence of the case three and one-half years after its commencement, named plaintiff therein is threatening to attempt to bring those defendants back into the case by service of process on them. (Pleading filed by named plaintiff February, 1974, in *Appleton Elec. Co. v. Advance-United Expressways* (N. Dist. Ill., E. Div., Docket No. 70-C-1427).)

[5] Additional splits, also under this I.C.C. order, have occurred. On the merits, the issue of whether an action for enforcement against motor carriers has been incorporated into Part II of the Act has resulted in a split decision in the Sixth Circuit in the *Kresge* case. (See n. 2, *supra*, and the petition itself disclosing some of the deviations from prior precedent in this Court). The lower courts have adopted a variety of interest rates ranging from 0% in the *Kresge* case to 6% in several of the other proceedings presently on appeal. Likewise, a variety of dates from which interest is said to run have been selected in the pending related cases by the lower courts. On the related question of awards of attorneys' fees, the courts have ranged from 0% to 94% of the base damage awards. Obviously, the result has been a total lack of uniformity in the *effective* rate levels between various shippers.

the litigation, as well as the inter-related issues, for full consideration of the impact of the order, proper overall interpretation of the Interstate Commerce Act as it applies to motor carriers, and the ramifications on the National Transportation Policy presented by this nationwide litigation.

REASONS FOR GRANTING THE WRIT

I.

The Seventh Circuit has decided this federal question in a way in conflict with this Court's decision in A. J. Phillips Co. v. Grand Trunk W. Ry, 236 U.S. 622 (1915), and the unbroken line of cases in this Court following that decision.

Respondents fail to come to grips with the fact that their complaint and action relied upon an order of the Interstate Commerce Commission of June 5, 1969. Assuming, without conceding, that their complaint, filed April 27, 1971, sought enforcement[6] of the Commission's order, it is apparent on the face of the pleadings that the plaintiffs failed to comply with the provisions § 16(3)(f):

> A complaint for the enforcement of an order of the Commission for payment of money shall be filed in the district court or the State court within one year *from* the date of the order, and not after.

This juxtaposition shows that suit was not commenced "within one year *from* the date of the order." In reversing that holding by the trial court, the Seventh Circuit ruled that:

> In our opinion the "date of the order" within the meaning of § 16(3)(f) is the date on which the

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[6] A suit under § 16 (not pleaded by these shippers) for "enforcement" is, in reality, a civil suit for damages. (*E.g., Steel, Inc. v. Atchis. Top. & Santa Fe Ry*, 41 F.R.D. 337 (D. Kans., 1966) based on the condition precedent of I.C.C.'s *prima facie* findings of affirmative past unlawfulness of past railroad charges, normally. E.g., *City of Danville v. C. & O. Ry*, 34 F. Supp. 620 (D. Va., 1940).)

> litigation prosecuted by the carriers to obtain judicial review of the Commission's order was completed.
> Petition for Certiorari, Appx D(2) at D-6.

That ruling disinters a contention which this Court buried almost 60 years ago. In the *Phillips* case,[7] the shipper's right of action was held extinguished notwithstanding that its suit had been commenced within two years[8] of the final Supreme Court affirmance of the Commission's findings underlying the proposed action. The rules established in *Phillips* regarding the proper construction of substantive limitations provisions such as the one here in issue have prevailed to the present day. Nor do Respondents suggest any precedent in this Court deviating therefrom, although they do reference cases of other circuits plainly in conflict with the rule handed down by the Seventh Court in this proceeding in Parts II and III of their Brief in Opposition.

The Respondents now assert that the defense of the statute of limitations cannot be argued by the carriers, and that they are estopped or have waived their rights. (Brief in Opposition, p. 8). But that argument is contrary to compelling precedent also. *E.g., Mid-State Horticultural Co. v. Pennsylvania R.R.*, 320 U.S. 356 (1943); *United States v. Western Pac. R.R.*, 352 U.S. 59, 76 (1956) (and cases cited); *Phillips, supra*, 236 U.S. at 668.

The further contention in the Brief in Opposition (pp. 7, 8) that the decision permitting these shippers to sue conformed with the Act's underlying uniformity principle is preposterous. Permitting these shippers' separate action will only increase the lack of uniformity as to the charges involved. *Cf., Keogh v. Chicago & N.W. Ry*, 260 U.S. 156 (1922). See n. 5, *supra*, and related text.

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[7] *A. J. Phillips Co. v. Grand Trunk W. Ry*, 236 U.S. 662 (1915).

[8] The then-effective term of the virtually identical provisions. The shorter, one year provision, later passed by Congress is substantially similar but cannot be interpreted as providing a longer period for suit. See Act of June 7, 1924, which amended the section generally and divided it into subsections.

In justification of its decision, the Seventh Court infers that the Commission order is not final or enforceable before judicial review is completed. Petition for Cert., Appx D(2) at D-6. That rationale itself presents a substantial conflict with the prior decisions holding that an order is final at such point in time when it is final before the tribunal entering it. But more impressive is the fact that the same Circuit has upheld a judgment entered on this I.C.C. order entered *before* the final stages of the direct review action. *Admiral-Merchants Motor Freight, Inc. v. Aluminum Co. of America,* 486 F.2d 717 (7th Cir., 1973), affirming Nov. 1971 decision in *Aluminum Co. of America v. Admiral-Merchants Motor Freight, Inc.,* 337 F. Supp. 672 (N.D. Ill., 1971).

The Interstate Commerce Act itself explicitly and thoroughly defines the attributes of finality in connection with enforcement of Commission orders. See generally, §17 of Title 49. And, the *permitted* deviations within the statutory scheme are explained in §17(8), wherein Congress has provided that even an application for rehearing in the circumstances of the present case would not stay or postpone the enforcement of the order entered by the full Commission "without the special order of the Commission."[9]

Even though petitions for reconsideration were filed with the Commission to reopen and reconsider, under its continuing jurisdiction,[10] no special order of the Commission was entered operating to stay the refund language so as to delay the time within which enforcement thereof must be sought. The later orders denying reopening and reconsideration did not affect the finality of the June 5 full Commission order. See notes 11 and 17, *infra.* Indeed, judgment might have been rendered by a court even while the petitions were pending before the I.C.C. *Gulf, M. & N. R.R. v. Merchants'*

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[9]No suspension of the one year period is provided for in the provisions conditioning the right to sue, itself. 49 U.S.C. §16(3)(f).

[10]49 U.S.C. §17(6). See *B. & O. R.R. v. United States,* 386 U.S. 372 (1967); *Chicago & N.W. Ry v. United States,* 311 F. Supp. 860 (N.D. Ill., 1970); *Riss & Co. v. United States,* 100 F. Supp. 468 (D. Mo., 1951), aff'd 342 U.S. 937, reh. den. 343 U.S. 937.

Specialty Co., 50 F.2d 21 (5th Cir., 1931); *Corray v. B. & O. R.R.*, 2 F. Supp. 829 (E.D. Ill., 1933).[11]

The order of June 5, 1969 was enforceable on June 5, 1969, if at all, and *one year from the date of the order expired prior to the commencement of the class suit*[12] *referenced by the Respondents and prior to the entry of any restraint in the direct review litigation.*[13] That year expired June 5, 1970 – almost eleven months before the shippers' suit was filed in the trial court below.

Paramount among the considerations which should be given effect here is the fact that Congress did *not* provide that suit might be brought within one year after the final determination had been made in a direct review proceeding, if such

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[11] "The carrier appeals and relies on two grounds for reversal. The first is that the order of reparation was not final. That order was issued by the commission March 11, 1929, and allowed appellant until April 26 following to make reparation. This action was brought in the district court in September 1929, appellant having failed up to that time to comply with the commission's order by making reparation, or to apply for a rehearing. In March, 1930, appellant filed before the commission a petition for rehearing, which was granted in May of that year. The Interstate Commerce Act provides that commission may establish general rules governing applications for rehearings, but that no such application shall excuse a carrier from obeying any order of the commission or operate to stay or postpone the enforcement thereof without special order; and that suit may be brought in the appropriate district court and be prosecuted in all respects like other civil suits for damages, if the carrier does not comply with an order of the commission for the payment of money within the time limit prescribed in such order. 49 USCA §§16a and 16(2). *The order of reparation had become final* under a rule of the commission before this suit was brought . . . ."
Gulf, M. & N. R.R. v. Merchants' Specialty Co., 50 F.2d 21 (5th Cir., 1931) (emphasis added).

[12] Filed June 15, 1970. Service on named defendants therein was made at even later dates. Notice to many unnamed defendants therein was sent in October of 1973; some have not yet been notified.

[13] On June 19, 1970, a T.R.O. entered prohibiting the government, a party, from enforcing the order, *et cetera*, in *Admiral-Merchants Motor Freight, Inc., v. United States*, 321 F. Supp. 359 (D. Colo., 1971).

proceedings were instituted.[14] The strained interpretation of the "plain language" of the statute embraced by the Seventh Circuit involves the rejection by the Circuit of the same rule which it has applied in a related case.[15] The result is an open-ended statute, since a review action may be commenced at almost any later date after the order has entered. See, e.g., *Riss & Co. v. United States*, 100 F. Supp. 468 (D. Mo., 1951), aff'd 342 U.S. 937, reh. den. 343 U.S. 937.

II.

The inconsistent alternative theories offered by Respondents in lieu of the decision below underline the conflicts between the circuits on the issue actually presented. The proposals conflict with the Seventh Circuit decisions and inter se. They would result in either indefinitely extended periods or no limitations at all. Congress obviously intended

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14 That Congress knows how to create statutes dependent for their running upon related court proceedings, if that is its desire, or intent, is made clear by 15 U.S.C.A. §16(b), the statute involved in the *American Pipe* case discussed at Section II, *infra*.

> Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commended either within the period of suspension or within four years after the cause of action accrued.
>
> Clayton Antitrust Act, §5(b), 15 U.S.C. §16(b) (1955), Ch. 253 §69 Stat. 283, formerly Ch. 323, §5, 38 Stat. 731 (1914).

15 See *Admiral-Merchants Motor Freight, Inc. v. Aluminum Company of America*, 486 F.2d 717 (7th Cir., 1973), *cert den.* December 17, 1973 (wherein the Court relied upon the "plain language" of the statute there in issue, citing *United States Gypsum Co. v. United States*, 253 F.2d 738, 744 (7th Cir., 1958)).

that there be a termination of suits within a given time and concurrent extinguishment of rights.

Respondents rely, in the alternative, upon the recent decision of this Court entered in *American Pipe and Construction Co. v. Utah, 42 U.S.L.W. 4155 (1973). Assuming the class action to have been instituted within the statute,* they contend that such class action would toll the statute of limitations for all purposes so that an independent suit might be brought at any time prior to the determination that such class action will not lie, and thereafter until the statute, as so interrupted, would have expired.

In *American Pipe* there seems to have been a dispute regarding whether the statute of limitations actually conditioned the right to sue – *i.e.*, whether it was substantive. No such dispute exists here. The regulatory scheme of the Interstate Commerce Act is, also, far different from the policies and purposes of the anti-trust laws involved in *American Pipe*. And, the limitations provisions bear no resemblance to each other. See n. 14, *supra.*

But the case is inapposite for a more fundamental reason. There, the issue was whether a plaintiff could intervene against the named defendants in the class suit which had, a few days earlier, been declared not to be a class action. The issue here, raised for the first time on appeal, is whether the shippers could belatedly maintain separate suit against 67 defendants in a class suit which were unnamed[16] and unnotified at the time of these shippers' separate action.

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[16]Plus 15 of the defendants named therein. The unnamed carrier defendants were not given notice of the pendency of the class suit, nor opportunity to opt out of that action (an opportunity, incidentally, which eviserated any hope of uniformity between the various 1,400 carriers and between the millions of shippers involved) until October, 1973. Thus, the shippers' argument here seeks to exhume their extinguished rights by belated suits against those unnamed class members even though, prior to this suit, those carriers had no notice of the pendency of these shippers' claims within the usual (statutory) one year set by Congress; nor for several years after the first shipments (May, 1968).

Furthermore, in *American Pipe*, the reliance of the intervenors upon the pendency of the class action was rather apparent in view of their prompt action after the case was found inappropriate for class handling. In the related class suit here involved, the alleged members of the plaintiff class have never been notified of the existence of the action. *Appleton Electric Co. v. Advance-United Expressways*, ____ F.2d ____ (7th Cir., 1974). And, there is nothing whatsoever to substantiate a contention of reliance upon the pendency of that action to justify the shippers' attempt to commence separate litigation almost a full year after the limitations provision expired by its own terms and almost three years after the first shipments involved (shipped May 20, 1968).

Respondents' argument in this regard would result in the extension of a substantive limitation provision for the entire duration of pending class litigation, with the result that the one year statute enacted by Congress would, in the circumstances, still be open today, four and one-half years "from the date" the order was entered. That this result was rejected by the Seventh Circuit below is manifest in its determination that the statute began to run "when tne judicial review sought by the carriers was concluded and the stay which had been entered by the district court in Colorado was lifted." Or, in other words, that the statute extinguished the right to sue on December 27, 1972, one year after the final dismissal of the precautionary appeal in the Tenth Circuit (December 27, 1971).

Nor is it anomalous to hold that while the Respondents might have successfully intervened in a class suit, they cannot maintain a separate action. If a class suit was operative to toll the §16(3)(f) limitations at all, it did so only for class members. But the Respondents below elected to commence separate litigation, which, by necessary inference, made their election and deprived them of the protection of any pending class litigation.

III.

There is no warrant in law or reason for having a "fixed date" which varies from shipper to shipper and which may vary, as well, from carrier to carrier with respect to each shipper claiming under a single I.C.C. order.

Respondents renew, in this Court, their argument that the explicit provisions of the statute did not foreclose suit for a shipper until one year after it had presented its claims to the carriers. This action, Respondents *allege*, did not occur until early 1971. (Brief in Opposition, pp. 10, 11).[17] Thus, as to these two shippers, the argument concludes, the statute did not run until early 1972.

Respondents urge that they cannot sue until the date set for compliance. Brief in Opposition, page 14, citing *I.C.C. v. Atlantic Coast Line R.R.*, 383 U. S. 576, 596 (1966). We

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[17] Petitioners contest this fact asserted by Respondents. It is without evidentiary support in the record below. The June 5, 1969 order (P. for Cert., Appx. B(4) at B-25, 26) did not say "file claims". That instruction to shippers was added by the order of August 29, 1969 (P. for Cert., Appx B(5), at B-32), when the I.C.C. advised the carriers to "make refund to shippers presenting their claims supported by paid freight bills or other appropriate evidence." Petitioners contest the fact asserted by these shippers that *any* "claims supported by paid freight bills or other appropriate evidence" have *ever* been presented to these carriers by these shippers. Additionally, this requirement was not a modification of the June 5, 1969 final refund order, but, as the I.C.C. later indicated (P. for Cert., Appx B(6), at B-34) was merely a statement describing more fully where the burden lay for supporting claims for refunds. *Cf., Missouri Pac. Ry v. C. E. Ferguson Sawmill Co.*, 235 Fed. 474, 477 (8th Cir. 1916), wherein the court noted that the later orders merely modified the first and "final" order in a formal particular which was immaterial to damages (or, "liability" as the I.C.C. said on October 27, 1969), since the later order did not change the date fixed there for payment (compliance). Since no such date was *ever* fixed in *this* case, the claims filing requirement must be considered merely formal. Clearly it was not intended to modify substantive rights under the June 5 order, or to establish *either* the compliance date *or* the commencement of the limitation period.

agree. We also agree that there was no date set for compliance. See Brief in Opposition, page 14. Compare the requirements of 49 U.S.C. §16(1). But, we *conclude* that since there was no compliance date, there could have been no default and that *the shippers therefore had no claim for enforcement* – even if the refund order was a valid exercise of administrative authority. See *Railroad Yardmasters v. Indiana Harbor Belt Ry,* 166 F.2d 326 (7th Cir., 1948).

It requires no further argument to disclose that Congress intended that there *be* a statute of limitations when it prescribed that suits must be filed "within one year from the date of the order." Nor does it require further argument to establish that the Congress intended that there be a single date applicable to all shippers and all carriers affected by a single order. It is equally clear that Congress intended that the extinguishment of the right to sue was not to be variable between shippers, nor between carriers which had transported traffic for particular shippers. See *A. J. Phillips Co. v. Grand Trunk W. Ry,* 236 U.S. 662, 667 (1915).

The order of June 5, 1969, was a final order. "One year from the date of the order" expired June 5, 1970 and on that date the rights, if any, of *all* shippers which had not sued were extinguished, uniformly. The statute is clear and not in need of interpretation or construction. The special revival of *these* shipppers' rights by distortion and disregard of that clear, plain language does not foster the underlying principle of the Act – uniformity of rates and charges.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, thus permitting a full presentation to this Honorable Court upon the merits, displaying the conflicts in existence between the circuits and the conflict between the decision sought to be reviewed, on the one hand, and established precedent of this Court, on the other. Alternatively, Petitioners pray that

this Court accept jurisdiction and summarily reverse the judgment of the Court below, affirming the trial court's judgment granting the dismissal of the complaint with prejudice.

Respectfully submitted,

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